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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No. 1164 of 1992
with
CIVIL APPLICATION NO.3721 OF 1996

For Approval and Signature:

Hon'ble MR. JUSTICE M.R. CALLA
and
MISS JUSTICE R.M.DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgement? - YES

2. To be referred to the Reporter or not? - YES

3. Whether Their Lordships wish to see the fair copy of the judgement? - NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? - NO

5. Whether it is to be circulated to the Civil Judge? - NO

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HER HIGHNESS MAHARANI SHANTADEVI

Versus

SAVJIBHAI H PATEL

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Appearance:
Mr.S.B.Vakil, seniour counsel, with Mr.P.M.Amin,
Mr.K.R.Modi and Mr.A.C.Gandhi for the appellant.

Mr.D.R.Dhanuka, senior counsel, with
Mr.S.J.Shah, Mr.Prashant G.Desai, Mr.H.M.Parikh,
Mr.M.C.Bhatt, Mr. B.H.Antia Advocates and
Mr.Manek Kalyaniwala, Solicitor for respondent No.1.

Mr.J.M.Thakore, learned Advocate General, with
Mr.K.C.Shah, learned A.G.P. and Mr.L.R.Pujari, learned
A.G.P.for respondents Nos.2 to 4.

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CORAM : MR.JUSTICE M.R.CALLA and

MISS JUSTICE R.M. DOSHIT

Date of decision: 15/06/1998

JUDGEMENT (Per M.R.Calla,J)

1. The facts of this case depict a lis between an Ex Ruler turned politician on one side and a builder developer - organizer on the other side who joined hands at the beginning apparently showing concern for the members of the weaker sections of the society through a highly ambitious project of raising 64306 dwelling units in the city of Baroda as a joint venture to implement and farther the 20 point programme of the then Prime Minister Mrs. Indira Gandhi. One was prepared to give the land which he was even otherwise likely to part with as an excess land under the Urban Land (Ceiling and Regulation) Act,1976 and the other offered his efforts, resources and initial expenditure for getting the scheme approved under S.21 of the above referred Ceiling Act, ofcourse not without any profit motive.

2. This is the defendant's first appeal under S.96 of the C.P.C. against the judgment and decree dt.12.3.92 passed by the learned 2nd Joint Civil Judge (S.D.), Baroda decreeing the Special Civil Suit No.70/80 with costs. The questions involved in this Appeal mainly hinge around the provisions of the Specific Relief Act, 1963, Urban Land (Ceiling & Regulation) Act, 1976 and Urban Land (Ceiling and Regulations) Rules 1976and the relevant notifications and guidelines issued thereunder, the Bombay Town Planning Act,1954, the Gujarat Town Planning & Urban Development Act, 1976, the Indian Contract Act, 1872, the Indian Evidence Act, 1872 and the Civil Procedure Code 1908.

3. Briefly stated the relevant facts of this case are as under:

I. Shrimant Fatesinh Rao P.Gaikwad ( Maharaja) Ex-Ruler of Baroda owned an immovable property popularly known as Laxmi Vilas Palace Estate situated in the city of Baroda admeasuring about 707 Acres of land bearing S.No.1 of Tika No.9C and 10C of Baroda Taluka and District Baroda.This property is situated within the limits of Baroda Municipal Corporation.

II. The Municipal Corporation,Baroda had prepared a development plan in respect of the lands within its jurisdiction under the provisions of Bombay Town Planning Act, 1954 , invited objections against the same and after considering the objections submitted the said development

plan for sanction of the Government of Gujarat.

III. The Govt of Gujarat issued a Notification dt.21.9.70 under S.10(1) of the Bomaby Town Planning Act, 1954, finalising the modification in the said development plan for the city of Baroda subject to modifications so finalised. The date 1.12.70 was specified as the date on which final development plan was to come into force. According to the development plan the part of the Laxmi Vilas Palace Estate or compound was under reservation for three purposes in three parts - (a) agriculture subsequently altered to recreation, (b) sports stadium and (c) bus terminus. The remaining part of the estate or compound was designated for residential use. The City Survey map shows that in Tika No.8/1C there is a jail and Tika No.8/2C is to the north of Tika No.8/1

IV. The Govt. of Gujarat then issued a Notification dt.17.5.75 under S.10A (1) of the Bombay Town Planning Act 1954 proposing to modify the aforesaid development plan dt.21.9.70. The variations included at item No.23 is the land of Laxmi Vilas Palace shown as "residential zone" in the sanctioned development plan of Baroda to be released from the said use and the land so released to be reserved for "open space" under S.7(b) of the Act. as per the accompanying plan; itemNo.24(1) the lands under reservation of "bus terminus No.4" towards the west of Rajmahal in the sanctioned development plan of Baroda to be released from the said reservation and the land thus released to be designated for "residential use" under S.7(a) of the Act as shown in the accompanying plan and item No.24(2) the lands marked as "W", "X", "Y", "Z" in the accompanying plan designated for "residential use" in the sanctioned development plan of Baroda to be released from the said use and the land thus released shall be released for "bus terminus No.4" under S.7(b)of the act as shown in the accompanying plan.

V. The Urban Land (Ceiling and Regulation) Act, 1976 was published in the Gazette of India dt.17.2.76, which will be hereinafter referred to as 'the Ceiling Act'. The Gujarat Town Planning and Development Act,1976 was enacted on 19.6.76.

VI. As required under the Ceiling Act which came into force on 17.2.76 and as it became applicable to the State of Gujarat every owner of the vacant land, as defined in the said Act, was required under S.6 of the said Act to make a declaration as to the vacant land held in excess of the ceiling limit prescribed therein. Accordingly, on or about 14.9.76 Shrimant Fatesinh Rao P.Gaikwad made a

declaration for an area admeasuring about 250 acres out of the said immovable property and it was declared by him as excess vacant land. In this declaration made under S.6(1) of the said Act, he indicated that exemption was being sought in respect of the said vacant land.

VII. On or about 11.11.76 Shri F.P.Gaikwad moved an application for exemption under S.20 of the said Act.

VIII. It appears that at this juncture Shri Savjibhai Haribhai Patel, a main partner of builders and organizers of M/s. Ashok Associates and Shrimant F.P.Gaikwad met and discussed about a Scheme for construction of dwelling units for the accommodation of the weaker section of the society to be presented for consideration under S.21 of the Ceiling Act. They arrived at some understanding and accordingly Savjibhai Haribhai Patel after some spade work and after entering into correspondence with certain financial Institutions conceived and prepared the Scheme for constructing 64306 dwelling units for members of the weaker section of the society estimating a cost of nearly 89 crores 3 lacks and 88 thousand rupees and the Draft Scheme was submitted to Shrimant F.P.Gaikwad for his own scrutiny.

IX. On 15.3.77 the Scheme with Plan and a Vakalatnama of one Shri Kureshi Advocate under signatures of Shri F.P Gaikwad were submitted for consideration under S.21 of the Act.

X. On 24.3.77 the memorandum of agreement which will be hereinafter referred to as 'MOA" was executed between Shri F.P.Gaikwad as "the owner" of the first part and Said Shri Savjibhai Haribhai Patel as "the licensee" of the second part. This MOA refers to the owners property popularly known as Laxmi Vilas Palace Estate, situate in the city of Baroda admeasuring about 707 Acres of land bearing S.No.1 of City, Tika No.9C and 10C of Taluka and District Baroda mentioning further that the licensee of the second part had evolved a Scheme for the construction of dwelling units for the accommodation of the weaker section of the society as envisaged by S.21(1) of the Ceiling Act on a portion of land of owner's property; i.e. property popularly known as Laxmi Vilas Palace Estate, save and except Laxmi Vilas Palace, Motibaug Palace and Nazar Baug Palace to be referred to as "the said property" ( which expression shall include standing structures, pucca as well as kutcha, and all natural growths thereon and all trees ad plants etc.) and the parties agreed to 19 terms in all, as set out in this MOA at No.1 to 19, and this MOA was signed by Shri

F.P.Gaikwad and Shri S.H.Patel.

XI. On this very date i.e. 24.3.77 Shri F.P.Gaikwad also executed a Power of Attorney (which will be hereinafter referred to as "POA") in favour of Shri S.H.Patel to be his true and lawful Attorney and to do and caused to be done on his behalf all or any of the acts, deeds, matters and things detailed out at Items Nos.1 to 13 of this POA duly signed and delivered by Shri F.P.Gaikwad.

XII. Acting under this Memorandum of Agreement and representing Shri F.P.Gaikwad under this POA the Scheme which had been earlier submitted on 15.3.77 ( when there were no guidelines) was revised on 5.10.77 in view of the first guidelines which were issued on 1.10.77 pending the finalization of the guidelines by the Central Government.

XIII. On 19.12.77 Central Government finalised the guidelines and, therefore, another Scheme dt.6.2.78 was submitted. Town planning notification dt.16.1.78 was to be effective from 15.3.78 with regard to the change from residential to open space. This was also kept inview in the scheme dated 6.2.78.

XIV. On 10.2.78 an affidavit-cum-declaration was sworn in by Shri F.P.Gaikwad before the Chief Judicial Magistrate, Baroda which will be hereinafter referred to as "ACD"

XV. On 14.3.78 the competent authority under the ceiling Act issued notices for the date 22.3.78 to Shri F.P.Gaikwad as well Shri Savjibhai Haribhai Patel.

XVI. On 22.3.78 Shri Ranjitsinh P.Gaikwad the holder of the constituted Power of Attorney of Shri F.P.Gaikwad appeared before the competent authority. He was accompanied by lawyer and he also submitted that the scheme dt.6.2.78 which has been accepted as such by the owner Shri F.P.Gaikwad may be sanctioned.

XVII. On 1.4.78 the Government. of Gujarat published the guidelines under the Ceiling Act elaborating the guidelines issued by the Government. of India.

XVIII. On 8.1.79 the scheme dt.5.1.79 was submitted and the revised drawing was submitted on 16.1.79

XIX. On 29.1.79 alternative scheme was submitted reducing the number of houses to 4000 only because the authorities considered that the number of houses under

the scheme should be reduced keeping in view the practical aspects. This scheme was processed by Municipal Corporation, the Town Planning Dept. and the City Engineer.

XX. On 15.11.79 the specified authority under the Ceiling Act accorded its approval to the alternative scheme dt.29.1.79

XXI. On 2.2.80 the Deputy Secretary, Revenue Department of the Government of Gujarat sent the confidential letter to the competent authority and Additional Collector, Urban Land Ceiling as also to the Superintending Engineer, Roads and Buildings with reference to Government letter dt.15.12.78, final confidential letter dt. 19.2.79 of the competent authority and Government letter dt.31.9.79 and the confidential letter dt. 3.12.79 of the competent authority calling upon the competent authority that it should accord sanction to the scheme U/S 21 of the Act immediately and he should not mention confidential instructions of the Government therein.

XXII. On 7.2.80 the specified authority sent the letter to the competent authority mentioning therein that the scheme may be approved after scrutinizing the same with reference to the Circular dt.22.5.79 and particularly para 6 thereof. In this letter reference was also made to the Revenue department confidential letter dt.2.2.80 and that the land under reservation for stadium, bus terminus and Akota road cannot be acquired under the Ceiling Act but Shri S.H.Patel had submitted the housing scheme with all the required amenities on Laxmi Vilas Palace Estate ground land admeasuring 2391125 sq.mt. by providing agricultural zone, stadium, bus terminus and road (Akota) which conforms with the development plan of Baroda city and that since it is a satellite township request was made to the competent authority to exempt this 2391125 sq.mts. of land declared in Form No.5 for the purpose of S.21(1) of the Ceiling Act. The plans duly signed by the architect and specified authority were also enclosed therewith.

XXIII. It appears that at this juncture Shri F.P.Gaikwad became non desirous of proceeding with the scheme and on 23.2.80 sent his advocate's letter to Shri S.H.Patel stating therein that MOA dt.24.3.77, the irrevocable power of attorney dt.24.3.77 and ACD 10.2.78 were void, illegal and inoperative in law so as to cancel or revoke the said agreement and irrevocable power of attorney. An

advertisement to this effect was also issued in newspapers. This was followed by letter dt.25.2.80 to the competent authority by the advocate of Shri F.P.Gaikwad requesting him not to proceed further with any applications in respect of his property under S.21, whether pending or which may be made in future by Shri S.H.Patel, who had no authority to act on behalf of Shri F.P.Gaikwad.

XXIV. Shri S.H.Patel through his advocate's letters dt.4.3.80 and dt.3.4.80 refuted the allegations contained in the letter dt.23.2.80 which had been sent by the advocate of Shri F.P.Gaikwad and called upon Shri F.P.Gaikwad to withdraw the letter dt.23.2.80.

XXV. On 7.4.80 the present Civil Suit being Special Civil Suit No.70/80 was filed in the Court of Civil Judge (S.D.) at Baroda by Shri Savjibhai H.Patel (who will be hereinafter referred to as "the plaintiff respondent) seeking the specific performance of the agreement, the injunction and interim and ad interim reliefs etc. The exact reliefs claimed in the plaint are at items Nos.(a) to (j) under para 35 of the plaint. In this plaint, as it was filed on 7.4.80, Shri F.P.Gaikwad was the sole defendant. Later on the specified authority, the competent authority and the State of Gujarat were impleaded as defendant Nos.2, 3 and 4. During the pendency of the suit, Shri F.P.Gaikwad expired on 1.9.88 and,therefore, while keeping his name as such as defendant No.1,his legal representative her Highness Maharani Shantadevi P.Gaikwad was arrayed as defendant No.1/1.

XXVI. On 14.7.80 the written statement dt.12.7.80 had been filed on behalf of Shri F.P.Gaikwad under the signatures of his constituted attorney Shri R.P.Gaikwad.

XXVII. Thereafter, the supplementary written statement dated 20.4.85 appears to have been filed on 24.6.85 by the defendant Shri F.P.Gaikwad.

XXVIII. On 19.12.85 the written statement was filed on behalf of defendants Nos.2 to 4 i.e. specified authority, competent authority and State of Gujarat.

XXIX. On 30.6.89 the written statement was filed on behalf of defendant no.1/1 i.e. Her Highness Maharani Shantadevi.

XXX. On 21.4.90 amended written statement was filed on behalf of defendant No.1/1/ Her Highness Maharani

Shantadevi.

XXXI. On the basis of the pleadings of the parties the following 25 issues were framed vide Exh.235 dt.30.4.90.

1. Whether deft.No.1/1 proves that the Memorandum of Agreement and/or Power of Attorney and/or declaration deed 10.2.1978 is illegal, null and void and not binding on the parties thereto for the reason stated in para 2 (xiv) executed by deft.no.1 is not valid and not binding on the original deft.no.1?

2. Whether deft.No.1/1 proves that the Memorandum of Agreement read with irrevocable power of attorney or declaration is vague, uncertain and unmeaningful and/or meaning thereof is capable of being accepted on the grounds stated in para 2 (xii) of the written statement?

3. Whether deft.no.1/1 proves that Cl.17 of the Memorandum of Agreement expressly and/or impliedly refers a right of the parties inclusive of original deft.no.1 to unilaterally rescind the said agreement at any time before the plaintiff was put in the possession of the said property as contended in para 2(xiii) of written statement?

4. If yes, whether rescission of the agreement is legal and valid?

5. Whether deft.no.1/1 proves that the declaration deed dated 10.2.1978 by original deft.no.1 was made in ignorance facts as alleged in para 2(x) of written statement Ex.46?

6. Whether deft.No.1/1 proves that the agreement Ex.4/1 is unlawful or contrary to the provision of Sec.26 and 27 of Urban Land (Ceiling and Regulation ) Act, 1976 as contended in para (xvi) of the written statement Ex.46?

7. Is it proved that in view of the Urban Land (Ceiling and Regulation) Act, 1976 schemes submitted by the plaintiff before the authorities under Urban Land (Ceiling and Regulation) Act, 1976 and action taken thereon by the authorities are legal?

8. If yes, does deft.no.1/1 proves that the scheme submitted before the authorities were ineffective

and not binding on the deft. as contended in para 2(xi)(1)?

9. Does first deft. proves that there is no concluded or enforceable agreement arrived in between the parties as contended in para 2(xii) of the written statement?

10. Was the original first deft. entitle to rescind and/or termination and/or revoked the suit memorandum of agreement and/or suit power of attorney and/or declaration dated 10.2.1978 as contended in para 2 of the written statement?

11. Whether original first deft. is estopped from rescinding agreement and/or raising contention against the scheme submitted by the plaintiff under the irrevocable power of attorney Ex.4/2?

12. Whether deft.no.1 proves that 2nd, 3rd and 4th deft. have acted beyond their powers and illegally in receiving letters dated 15.11.1979, 5.2.1980 and 2.2.1980 as per para 6 of the written statement Ex.46 and as contended in para 18 of supplementary written statement Ex.127?

13. Whether plaintiff proves that he has paid about Rs.16,75,000/- for the purpose of execution and/or implementation of the scheme and/or agreement as alleged in plaint para 29?

14. Whether plaintiff proves that he was at all times material and is yet ready and willing to perform as part of the contract as alleged in plaint para 26?

15. Whether alleged Power of Attorney dated 24.3.1977 and/or alleged agency or authority created or conferred by the original deft. no.1 in favour of the plaintiff come to an end or stood revoked and/or is deemed to have come to an end and/or stood revoked on the death of original defendant no.1 as alleged in para 4 of the written statement of deft.no.1/1?

16. Whether the plaintiff is entitled to perpetual injunction as alleged in para 27 of the plaint?

17. Whether plaintiff is entitled to an order directing the original deft.no.1 to withdraw and/or cancel any letter to any authority as

alleged in para 26 of the plaint?

18. Whether the plaintiff is entitled to a decree or order directing original deft.no.1 to specifically perform an agreement as alleged in para 26 of the plaint?

19. Whether in view of absence of any relief being claimed against deft.no.1/1 a suit has against the deft. is liable to be dismissed?

20. Whether deft.no.1/1 proves that the plaintiff has no right to modify, alter or revise the agreed scheme?

21. Whether the breach is committed by the plaintiff alleging to the termination of the suit agreement vide letter/notice dated 1.9.1980?

22. Whether the plaintiff is not entitled to decree for specific performance and injunction?

23. Whether the plaintiff is entitled to a decree of specific performance and injunction as prayed in para 35 of the plaint?

24. Whether the plaintiff is not entitled to specific performance as prayed for for the reasons alleged in para 8 of the written statement of the deft.no.1/1?

25. What order and decree?

XXXII. On the basis of the trial the judgment was delivered on 12.3.92 by the 2nd Joint Civil Judge (S.D.), Baroda whereby the suit had been decreed. The operative part of the order is as under:-

"ORDER

The plaintiff's suit is decreed with costs,as prayed for.

It is hereby declared that Memorandum of Agreement dated 24.3.1977, irrevocable power of attorney dated 24.3.1977 and affidavit cum declaration dated 10.2.78 are valid and subsisting and those were binding on original deceased deft.no.1 and are binding on deft.no.1/1 also.

The Specific performance of Memorandum of agreement dated 24.3.1977 is granted in favour of the plaintiff. The

deft.no.1/1 is ordered to specifically perform the Memorandum of agreement dated 24.3.1977.

The deft.no.1/1 is restrained by a permanent injunction from committing breach of agreement, irrevocable power of attorney and acting contrary to the said agreement and said power of attorney and representing to competent authority or any other authority that authority of plaintiff to act as a constituted attorney of original deft. No.1 is withdrawn and obstructing the plaintiff from acting as constituted attorney of deft.no.1 for the purpose and period mentioned in the said power of attorney and preventing the plaintiff from taking any action regarding the execution of the scheme under the said agreement and doing any act so as to prejudice the rights of the plaintiff under the said agreement dated 24.3.1977, power of attorney dated 24.3.1977 and affidavit cum declaration dated 10.2.1978 and making any application for revocation or cancellation of the scheme presented or which may be presented by the plaintiff to the competent authority and from selling, mortgaging, exchanging, leasing or assigning the suit property and from creating any charge or interest in favour of any person in respect of suit property. Thus, the deft. no.1/1 is restrained by permanent injunction as prayed for in para 35(d) of the plaint.

The deft.no.1/1 is hereby ordered to forthwith withdraw or cancel the letter written by original deft. deceased no.1 to the competent authority or other authority intimating them about the termination of the agreement and irrevocable power of attorney as prayed for in para 35(e) of the plaint.

The deft.no.1/1 shall pay the costs of the plaintiff and defendants no.2 to 4.

The deft.no.1/1 shall bear her own costs.

Decree be drawn accordingly."

XXXIII. On 18.6.92 this First Appeal was presented before this Court.

4. Alongwith this First Appeal a Civil Application No.2278/92 was filed seeking the stay of the operation, implementation and execution of the judgment and decree dt.12.3.92. This Appeal alongwith the aforesaid Civil Application came up before the court on 19.6.92 and on 19.6.92 the matter was made to stand over to 6,.7.92 and

the order of the stay granted by the trial court was extended up to 7.7.92 and the same was further extended from time to time. On 22.12.92 the Appeal was admitted with an order that hearing be expedited and on this very date the service was waived on behalf of plaintiff-respondent No.1 and while issuing notices as to interim relief to respondents Nos.2,3 and 4 in the Civil Application which were made returnable on 22.1.93, ad interim relief in terms of para 3(A) was granted in the meantime, with the condition that the ad interim relief shall be subject to the condition that the appellant shall maintain status quo as regards the suit property. This interim order was also extended from time to time and on 30.3.93 an order was passed in the Civil Application, that the Civil Application will be heard with the First Appeal which is fixed on 15.4.93 and on this date also the interim relief was ordered to continue till then. On 15.4.93 the interim relief was extended till further orders. In the main Appeal also an order was passed on 30.3.93 fixing the first appeal on 15.4.93 and that record and papers be called for immediately and further that the plaintiff-respondent No.1 may prepare the paper book and the print was dispensed with for the present. The defendant- appellant herein preferred Letters Patent Appeal before the Division Bench being L.P.A.No.198/93 against that part of the order dt.30.3.93 whereby the appeal was fixed for hearing on 15.4.93 and the Division Bench disposed of the L.P.A. fixing the Appeal for final hearing on 17.1.94 before the Division Bench. This order was passed in the Letters Patent Appeal on 22.4.93 and this is how this matter which was so far heard by the single Bench and which was otherwise to be heard by the single Bench, as was fixed for hearing on 15.4.93, came up before the Division Bench as ordered by the Division Bench in the Letters Patent Appeal on 22.4.93. The matter came up before different Division Benches from time to time but could not proceed on account of exceptions being made by Hon'ble Judges and/or for other reasons and ultimately this matter was assigned by Hon'ble Chief Justice to this Bench on 2.2.98. Accordingly the main Appeal alongwith Civil Applications Nos.3721/96, 2278/92 with 835/93, 2840/92 with 7741/96, 4915/96, 7182/96, 8460/97 and 4176/96 were notified for final hearing on 9.2.98 in the Board before this Bench. It appears that on 4.2.98 the plaintiff - respondent No.1 moved yet another Civil Application being Civil Application No.1178/98 seeking to vacate the ad interim order 22.12.92 and 15.4.93 passed in Civil Application No.2278/92 as also the interim injunction granted on 22.12.92 in Civil Application No.2840/92 and the order extending the ad interim order etc. and this Civil

Application No. 1178/98 came up before this Bench on 9.3.98. On that day the parties were heard for some time on the C.A. and on the request of both the sides the main appeal which was earlier ordered by the Division Bench to be heard on 17.1.94 was itself ordered to be heard on 17.3.98. It was given out by both the sides that it is a lengthy matter and therefore, on the request of both the sides it was ordered that the matter shall be heard on Tuesdays, Wednesdays and Thursdays because this matter was assigned by the order of the Hon'ble Chief Justice and otherwise this Bench was essentially hearing the Criminal Appeals as per the sitting arrangement. The arguments were commenced on 17.3.98 and the matter was heard up to 29.4.98 on which date the arguments were concluded and order was reserved.

5. The record of this case includes 66 Volumes of paper books running into nearly 13,752 pages and learned counsel have argued the matter at length and in great details with full fervor and zeal coupled with tenacity and we may not be misunderstood of bigotry if we express that we have heard the matter with inexhaustible patience.

6. At the very threshold of his arguments Mr.S.B. Vakil appearing for the defendant-appellant argued certain points relating to the various orders which have been passed by the trial court during the course of trial and which had already been the subject matter of further litigation in the form of revisions before this Court and Spl.L.Ps before the Supreme Court also, he also raised objections that the original defendant had already expired but even after the amendment of the plaint there was no prayer against defendant No.1/1, the defendants Nos.2,3 and 4 i.e. specified authority, competent authority and State of Gujarat had been wrongly arrayed as defendants by the trial court on the application of the plaintiff and thereby a serious prejudice has been caused to him, that it was a case of misjoinder of parties which were neither necessary nor proper and the defendants Nos.2,3 and 4 had filed the written statement in collusion with the plaintiff, that certain important documents were not made available to the original defendant and defendant No.1/1, certain documents which should have been included in the evidence were not included,the evidence which should not have been taken on record was taken on record and the evidence which should have been taken on record was rejected, several questions which the defendant appellant had put to the witnesses were not allowed and that it was a case of mistrial, the written statement filed by the specified authority,

competent authority and the State of Gujarat was not verified in accordance with the provisions of CPC, rather it was not at all verified and that there was no verification by the competent authority and the specified authority and therefore the written statement dt.19.12.85 filed by the defendants Nos.2,3 and 4 has to be taken off the record and he also argued that an application being Civil Application No. 3721 of 1996 had been moved by him and that the same may be decided beforehand. However, we found it appropriate to decide this Application at the time of the final decision and, therefore, we will be dealing with the points, as aforesaid, and this Civil Application in the later part of this order and we would first deal with the main questions relating to the merits of the case.

7. The main controversy in this case centres around the following documents:-

i. MOA (Memorandum of agreement) dated 24.3.77 Exh.252 at page 32-38 in volume No.26 of paper book.

ii. POA (Power of Attorney) dated 24.3.77 Ex.253 at page 39-45 in volume 26 of the paper book.

iii. ACD (Affidavit - cum declaration) dated 10.2.78 Exh.254 at page 106-113 of volume No.26 of the paper book.

According to the first document i.e. MOA, the plaintiff was to prepare the scheme in conformity with the provisions of S.21(1) of the Ceiling Act in respect of the defendant's property as mentioned in the MOA and this Scheme was to be prepared at the entire cost of the plaintiff; the defendant was to appoint, constitute and nominate the plaintiff as his true and lawful Attorney for him and in his name and on his behalf to do or cause to be done all acts required for the purpose of execution of the said Scheme and in regard to the said property and such POA was to be irrevocable, till the whole scheme is carried out. The plaintiff was also to file the declaration with regard to the said property before the competent authority as required by S.21(1) of the Ceiling Act within the prescribed period and the defendant was to sign all relevant papers, applications, plans, drawings etc; the defendant was to deliver possession of the said property to the plaintiff for the execution of the said scheme; the defendant was to assist and co-operate with the plaintiff in complying with the terms and conditions that may be imposed by the competent authority under

S.21(1) of the Ceiling Act, the defendant authorised the plaintiff to recover the price of the land as may be determined by the competent authority and/or State Government from the prospective members, the defendant was not to make any claim for the land price recovered by the plaintiff from prospective members in the said scheme as the said land price determined by the competent authority and/or State Government or by the plaintiff in the event of the said Act being suitably amended, modified or repealed in future to be used and utilized by the plaintiff for the land development and land levelling charges of the said property; in consideration the plaintiff was to execute the housing scheme as provided in the agreement on the competent authority making the declaration and granting the permission in favour of the defendant by the competent authority to continue to hold the land of the said property for the purpose of the scheme and even without such declaration or permission in case the Act is suitably amended, modified or repealed in future; the plaintiff shall pay to the defendant an amount calculated at the rate of Rs.1/- (rupee one only) per sq.mt. from the profits earned from sales of the saleable construction on the said property constructed by the defendant for the purpose of the Scheme; the plaintiff was to keep the account for the purpose as on 31st. December of every year and to make the aforesaid payment latest by 31st March of the succeeding year. It was also agreed that the consideration so payable was dependent upon the tempo of construction and the sale of houses and consequently subject to a variation every year; the plaintiff was not to transfer the said property by sale, mortgage , exchange, lease or assignments or otherwise during the subsistence of this agreement. The plaintiff shall be entitled to receive deposits from the members and to obtain loan from Banks and other Institutions and/or individuals for financing the scheme on the security of the said property but the defendant will not be responsible for payment of the said loans or deposits obtained from the members of the scheme and/ or any financial Institutions or Banks. Within eight days of this agreement the defendant was to deliver the original title deed, documents and papers relating to the title of the said property to the Solicitors of the plaintiff for the investigation of title. On delivery of the possession of the said property, the plaintiff shall be entitled to construct dwelling units and other buildings constructed by the plaintiff shall always be of the ownership of and in possession of the plaintiff who will be entitled to make allotments of the dwelling units and to execute documents and transfer thereof in respect of respective allotees. The plaintiff shall be entitled

to cut down, remove and dispose of and realize sale proceeds of all standing timber, trees, flower, fruits, standing crops and grass and all kutcha and pucca construction, the existing fencing around the said property etc. on the said property. The plaintiff shall be entitled to dig into the said property for the purpose of construction of dug wells, tube wells and foundations of buildings, drainage, water line and other service line etc. and to use excavated earth, stone and other material for this purpose,but he shall not be entitled to run any mines or dig out minerals or to appropriate any hidden wealth which may be found during excavation. Clause (17) and (18) of this MOA are reproduced as under:-

"(17) The agreement shall not unilaterally rescinded by either party after the Licensee of the Second Part has been put in possession of the said property.

(18) Further terms will be agreed upon by and between the parties by negotiations and when any contigencies or exigencies occur in regard to the execution of the scheme."

Clause 19 relates to arbitration in case of dispute.

Through the second document i.e. POA dated 24.3.77 it was held out by the defendant that he desired that the property as mentioned in this document will be utilised for the construction of dwelling units, for the accommodation of weaker section of the society as per the scheme evolved by the plaintiff in accordance with the provisions of S.21(1) It makes reference to the MOA dt.24.3.79 and that the original defendant has nominated, constituted and appointed the plaintiff as his true and lawful attorney for the matters and things mentioned therein at items Nos.1 to 12, while clause 13 reads as under:-

"(13) This power is irrevocable.

And I declare that the power hereby created shall be irrevocable till the scheme is finalised carried out and executed as agreed in the agreement dated 24th day of March, 1977, executed between myself and the said SHRI SAVJIBHAI HARIBHAI PATEL."

And at the end of this document it has been mentioned as under by the original defendant:-

"And I hereby for myself, my heirs, executors, and administrators ratify and confirm and agree to ratify and confirm whatsoever my said Attorney or any substitute or substitutes acting under him shall do or purport to do or cause to be done by virtue of these presents."

The third document is ACD (Affidavit cum declaration) sworn by the defendant on 10.2.78. It was sought to be explained on behalf of the plaintiff that this affidavit was made by the defendant as an interpretative document to make certain clarifications for the convenience of the parties and it was in conformity with clause (18) of the MOA.

8. In the context of the facts narrated hereinabove and the three documents as aforesaid, the reference has been made by the parties to the following five Schemes, which were submitted before the authorities under the Ceiling Act for consideration under S.21 of the Ceiling Act.

I. The first Scheme dt.15.3.97 is Exh.426 under covering letter dt.15.3.77 signed by the original defendant addressed to the Superintending Engineer i.e. the Specified Authority under the Ceiling Act. with a specific mention there that organizers of this Scheme are M/s. Ashok Associates who have large experience of organising and executing major building work and development scheme; they have already negotiated and obtained assurance of necessary finances from Scheduled Banks vide copies of the letters attached . It was also mentioned in this letter that the original defendant would be a pioneer in proposing such a dynamic scheme for housing which was very much consistent with the national objective embodied in the twenty point economic programme and in reality this may be the first scheme of this magnitude for Gujarat State and perhaps for the whole country. It was further mentioned that a part of this land does not come within the purview of the Ceiling Act, being agricultural land and for other valid reason. Yet the personal interest is forgone and all this land has also been included in this scheme to facilitate the integrated planning of this most useful scheme in the interest of economically weaker section of the society. The hope was expressed that the Government and the city

authorities will appreciate this gesture and extend fullest cooperation on their part. The request was made for early approval and sanction of this scheme and to provide valuable guidance and encouragement for its speedy implementation. The copies of the letters dt.7.12.76 sent by the Federal Bank Ltd. to the plaintiff, the letter dt.17.12.76 sent by the Union Bank of India to the plaintiff, the letter 22.12.76 sent by Bank of India to the Ashok Associates of which the plaintiff was the main partner, the letter dt.24.12.76 sent by Canara Bank to the plaintiff were also enclosed to show the capability to mobilize the funds for the Scheme. As per this Scheme the construction of 64306 dwelling units was proposed at a total cost of 89 crores, 3 lacs and 88 thousand rupees. The construction was proposed to be started within two months from the date of the approval of the housing scheme and was to be completed in ten years.

II. Second scheme was the scheme dt. 5.10.77. Exhs.462, 463 and 464. Exh. 463 at page 52-57 of Vol.26. In this Scheme the area as set out in Col.No.5 was 3102042 Sq.mts. and 38375 dwelling units were proposed at the estimated cost of 78 crores, 38 lacs and fourteen thousand rupees. The construction was to commence within two months from the date of the approval of the scheme and to be completed in ten years.

III. The third scheme was the scheme dt. 6.2.78 (Vol.26 Page 104 to 105B). Reference may also be made to Exhs.337, 338, 339,1087 (Vol.28 i.e. a separate volume). In this scheme the area shown was 3102042 sq.mts. for 35660 proposed dwelling units, at the estimated cost of Rs.39.59 crores, to be completed within a period of five years.

IV. The fourth scheme was the scheme dt. 5/8 January,1979 (Exh.340,341, 387 and 468) Vol.29 page 153. In this scheme the area was shown to be 2391125 sq.mts. for 25482 proposed dwelling units at the estimated cost of 48 crores 35 lacs 80 thousand, six hundred ten rupees and fifty six paise.

V. The fifth scheme was the scheme dt.29.1.79 (Ex.343 vol.26 page 193-196). The area was shown to be 1474100 sq.mts. after providing for deductions including area of agricultural zone

area, sports stadium, bus terminus and for construction of 4358 dwelling units only. It was also pointed out that for 4358 dwelling unit only 18751.66 sq.mts. area will be required and the area of the land required to be kept for common amenities shall not be less than 321000 sq.mts. The number of the dwelling units proposed to be constructed were shown as 2184 of Type-A and 2174 of Type-B. The total estimated cost was given out to be 12 crores 25 lacs 27 thousand 357 rupees.

9. As has already been mentioned while narrating the facts, it is this fifth scheme dt.29.1.79 which was approved by the specified authority under the Ceiling Act vide letter dt.15.11.79 sent to the competent authority under the Ceiling Act. At this stage while making reference to the Deputy Secretary's letter dt.2.2.80 as a confidential letter to the competent authority calling upon it to accord the final sanction to the scheme under S.21 of the Act immediately without mentioning therein the confidential instructions of the Government and the further letter dt.7.2.80 which had been sent by specified authority to the competent authority, reference may be made about the letter dt.3.3.80 which had been sent by the Deputy Secretary of the Revenue Department of the Government of Gujarat to the competent authority and specified authority as also the minutes of the meeting dt.17.9.81 of the sub committee of the Cabinet of Government of Gujarat. It may also be pointed out that these two documents are amongst those 36 documents about which the grievance has been made by the defendant appellant that the same were not exhibited. However, the contents of this document dated 3.3.80 show that through this letter it was conveyed to the competent authority under the Ceiling Act that the Government had for the time being and till further order is passed, ordered to postpone the proceedings under the provisions of S.21 for exemption and accordingly the proceedings in hand be postponed till further order in the matter of housing scheme known as Laxmi Vilas Palace ground under the provisions of S.21(1) of the Ceiling Act submitted by Shri Savjibhai H.Patel. In this letter dt.3.3.80 a pointed reference has also been made to Revenue Department letter dt.2.2.80. In the context of this letter there was no question of the further consideration of this scheme for the final sanction by the competent authority after the specified authority's approval as envisaged under S.21 of the Ceiling Act. The contents of the other document i.e. the minutes of the 2nd meeting of the sub committee of the Cabinet of the Government of

Gujarat dt.17.9.81 show that the question of granting exemption under the provisions of the Ceiling Act was considered in 10 out of 42 cases by the sub committee. The case of the present scheme finds place at item No.5 in this document and while referring to the Government letter dt.2.2.80, referred above, and taking note of the litigation going on between the parties it was recorded that disputed land was necessary for public purpose and for development scheme and further that this land is shown as open space in the development map of Baroda and even bearing in mind this fact,the scheme does not deserve to be sanctioned under S.21. Hence the instructions passed to the competent authority vide letter dt.2.2.80 are set aside and decision is taken to intimate the same and to process the Form submitted by Shri Gaikwad. It was resolved to obtain necessary orders of the Government and,thereafter, it was resolved to give necessary instructions to the competent authority. While it is found on the basis of these 2 documents that no final decision either way had been taken at the level of the competent authority or the Government, the learned counsel for the defendant -appellant submitted that under the statute the power had been vested in the competent authority and there is no question of any instructions being issued by the Government as were done through the letter dt.2.2.80 and that the competent authority was to hold the inquiry and could also impose conditions and he had also raised several objections against the legality, validity, correctness and propriety of the scheme/schemes with reference to the provisions of the Ceiling Act. Whereas we find that the concerned authorities are still seized of the matter and the final decision is yet to be taken it is neither necessary nor desirable for us to go into all these objections, which have been taken against the scheme/schemes as such and basically it is for the concerned authorities to examine all the aspects including the technical aspect before taking the final decision and at this stage when the question with regard to the sanction by the competent authority under S.21 is yet to be considered, we do not find it appropriate to adjudicate upon the objections which have been raised by the learned counsel for the defendant appellant against the validity of the scheme/schemes as such. However, S.21(1) is reproduced as under for ready reference:

"Excess vacant land not to be treated as excess in certain cases,- (1) Notwithstanding anyting contained in any of the foregoing provisions of the Chapter, where a person holds any vacant land in excess of the ceiling limit and such person declares within such time, in such form and in

such manner as may be prescribed before the competent authority that such land is to be utilised for the construction of dwelling units (each such dwelling unit having a plinth area not exceeding eighty square metres) for the accommodation of the weaker sections of the society, in accordance with any scheme approved by such authority as the State Government may,by notification in the Official Gazette, specify in this behalf, then, the competent authority may, after making such inqury as it deems fit, declare such land not to be excess land for the purposes of this Chapter and permit such person to continue to hold such land for the aforesaid purpose, subject to such terms and conditions as may be prescribed, including a condition as to the time limit within which such buildings are to be constructed."

10. A plain reading of the language of this section would show that after the approval is given by the specified authority the competent authority may after making such inquiry as it deems fit declare such land not to be excess land for the purpose of this Chapter III and permits the person to continue to hold such land for the utilisation of the land for construction of dwelling units for accommodation of weaker sections of the society subject to such terms and conditions as may be prescribed including the condition as to the time limit within which such buildings are to be constructed. The learned counsl for the plaintiff - respondent submitted that the Government could issue the instructions as were contained in the Govenment's letter dt.2.2.80 in view of the guidelines which were issued by the Government on 22.5.79 (vol.26 page 258). In these guidelines it has been provided at item No.17 that with regard to the scheme under S.21 the competent authority has to send the scheme for prior approval of the Government. He has also relied upon S.35 of the Ceiling Act under which the State Government may issue such orders and directions of a general character as it may consider necessary in respect of any matter relating to the powers and duties of the competent authority and thereupon the competent authority shall give effect to such orders and directions. Even if it is taken that the requirement of item No.17 of the guidlines dt.22.5.79 is covered by the Government's power under S.35 to issue appropriate directions to the competent authority, the Government could not have issued instructions to the competent authority in a particular case and, therefore, with regard to this particular scheme, which had been approved by the specified

authority, there was no occasion for issuing any instructions as the competent authority had not taken any decision. The competent authority has to send the scheme under item No.17 of the Guidelines dt.22.5.79 only after it takes a decision with regard to the final sanction after holding the inquiry. Thus, the decision by the competent authority itself is a condition precedent so as to invoke the requirement of item No.17 of the guidelines dt.22.5.79 and at this stage there is no question of any instructions, more particularly when the competent authority was still seized of the matter. It was also argued by the learned counsel for the plaintiff respondent that in the sub committee's minutes dt.17.9.81 there is no reference to the scheme dt.29.1.77 which had been approved by the specified authority and that at item No.5.2 of these minutes it is mentioned that the instructions vide letter dt.2.2.80 had been issued having obtained the opinion of the legal department and that the necessary orders were yet to be obtained from the Government, although the sub committee of the Cabinet had resolved to set aside the letter dt.2.2.80 as has been mentioned in para 5.8 of the minutes of the sub committee. He had also pointed out that no steps were taken after and in pursuance of these minutes dt.17.9.81 and no communication in this regard was sent to any one. He has also pointed out that these minutes are un-signed. Whereas we have already observed that it is not necesary and desirable for us to express any opinion about the validity, correctness, propriety and legality of the scheme and whereas we find that no final decision had been taken under S.21 and the competent authority has yet to take a decision under S.21 in accordance with law, we will proceed on the premises that there is no decision by the competent authority under S.21 and it will be for the concerned competent authority to take into consderation all the aspects before it takes the decision under S.21 in accordance with law.

11. In this background, in our opinion, the following questions are required to be considered as the main questions:

(i) Whether
 (a) the MOA could not be rescinded?
 (b) the POA could not be revoked?
 (c) the ACD did not cease to be operative?

(ii) In case it is found that MOA could not be rescinded, POA could not be revoked and ACD did not cease to be operative, whether it is a case for specific performance and as to whether the

plaintiff is entitled to the decree of specific performance and other allied and consequential reliefs?

(iii) If the question No.(ii) is answered in affirmative, whether the specific performance has to be ordered subject to any condition?

12. Before we deal with the questions formulated as above, we find it appropriate to first consider the relevant provisions and the position of law. Section 201 of the Indian Contract Act, 1872 provides for termination of agency. For the purpose of the case at hand, only two of the contingencies provided in Section 201 are relevant. One is that the agency can be terminated by the principal by revoking its authority and the other is that the death of the principal. However Section 202 of the Contract Act provides that, where the agent has an interest in the property which forms the subject matter of the agency, the agency cannot, in the absence of a express contract be terminated to the prejudice of such interest. The statutory illustrations given under this Section 202 save the situations in which the authority cannot be revoked even in case of death. Section 203 of the Contract Act provides as to when the principal may revoke agent's authorities and accordingly the principal may revoke the authority save as is otherwise provided by Section 202, at any time before the authority is exercised so as to bind the principal. Section 204 of the Contract Act provides that the principal cannot revoke the authority given to his agent after the authority has been partly exercised, so far as regards such action/obligation as arise from acts already done agency. Thus, the termination of an agency by the principal has to be examined in the light of the provisions as aforesaid in the facts of the present case. In this regard, the question arises as to whether the agent, that is the plaintiff respondent, in the instant case, had any interest in the property which forms the subject matter of the agency; whether there is an absence of an express contract for termination and what will be the effect of the death of the principal on the question of revocation. On behalf of the appellant, the argument was raised that the interest in the subject matter of the agency should be an interest pertaining to a pre-existing right and not an interest by virtue of the contract and authority itself and that even if the power had been described as irrevocable as per Clause 13 of the POA, Clause 17 of the MOA has to be read as the express term of the contract for the purpose of rescinding the MOA at any time before the plaintiff respondent could be put

into possession of the property and in fact, the plaintiff respondent has not been put into possession of the property in question.

For the purpose of examining these aspects, none of the three suit documents can be examined in isolation and the three suit documents, i.e. Exhs. 252, 253 and 254 have to be read together, because these three documents are relevant to the transaction. In cases where the transaction is contained in more than one documents, the rule is that all the deeds relevant to the transaction are to be read together. Odger's has formulated the following principle in his work, "The Construction of Deeds and Statute", 5th Edition, at page 58 as under:

"The deeds need not be executed simultaneously, so long as the court, having regard to the circumstances, comes to the conclusion that the series of deeds represents a single transaction between the same parties. If this is so, the series will be treated as one deed "and of course one deed between the same parties may be read to show the meaning of a sentence and be equally read, although not contained in one deed, but in several parchments, if all the parchments together in the view of the court make up one document for this purpose".

Whether it was a case of an agency coupled with interest or not, has to be considered on the construction of all the three documents and they have to be read together.

The learned Counsel for the plaintiff respondent in this regard has placed reliance on the following decisions:

In the case of GODHRA ELECTRICITY CO.LTD. AND ANR., v. THE STATE OF GUJARAT AND ANR., reported in AIR 1975 S.C. 32, the Supreme Court observed in para 11 that, in the process of interpretation of the terms of the contract, the Court can frequently get great assistance from the interpreting statements made by the parties themselves or from their conduct in rendering or in receiving performance under it. Parties can, by mutual agreement, remake their own contracts; they can also, by mutual agreement, remake them. The process of practical interpretation and application, however, is not regarded by the parties as a remaking of the contract; nor do the court so regard it.

In the case of TIMBLO IRMAOS LTD., MARGAO v. JORGE ANIBAL MATOS SEQUEIRA AND ANR., reported in AIR 1977 S.C. 734, on the question of construction of deed and power of attorney, it was observed in para 11 that, the most important factor in interpreting the power of attorney is the purpose for which it is executed and the purpose must appear primarily from the terms of the power of attorney itself, and only when there is an unresolved problem left by the language of the document, that need to consider the manner in which the words used could be related to the facts and circumstances of the case or the nature or course of dealings. The Supreme Court observed that the rule of construction embodied in proviso 6 to Section 92 of the Evidence Act enables the court to examine the facts and surrounding circumstances to which the language of the documents may be related. The Supreme Court has thus laid down the principles of interpretation of a document such as the power of attorney.

In the case of CHATTANATHA KARAYALAR v. THE CENTRAL BANK OF INDIA LTD., AND ORS., reported in AIR 1965 S.C. 1856, while placing reliance on (1912)-1 CH 735, (754), it was held that where a transaction between the same parties is contained in more than one document, they must be read and interpreted together and they have the same legal effect for all purposes as if they were one document. In this case, the loan was secured from the Bank and the letter, promissory note and deed of hypothecation was executed in favour of the Bank by the three defendants and it was held that all documents read together satisfy the condition of Section 126 of the Contract Act and Section 92 of the Evidence Act did not apply. The following passage was quoted by the Supreme Court from Manks v. Whiteley 1912-1 Ch.735 at p.754, Moulton. L.J. stated:

"Where several deeds form part of one transaction and are contemporaneously executed they have the same effect for all purposes such as are relevant to this case as if they were one deed. Each is executed on the faith of all the others being executed also and is intended to speak only as part of the one transaction, and if one is seeking to make equities apply to the parties they must be equities arising out of the transaction as a whole."

In "Halsbury's Laws of England", 4th Edition, Re-issue, Volume I(2), in para 183 at page 15, under the

sub-heading (2), 'Irrevocable Authority' under the main heading of '8. Termination of Agency', the statement of law with regard to Authority coupled with interest, has been formulated as under:

> "183. Authority coupled with interest. Where the agency is created by deed, or for valuable consideration, and the authority is given to effectuate a security or to secure the interest of the agent, the authority cannot be revoked. Thus, if an agreement is entered into on a sufficient consideration whereby an authority is given for the purpose of securing some benefit to the donee of the authority, the authority is irrevocable on the ground that it is coupled with an interest. So an authority to sell in consideration of forbearance to sue for previous advances, an authority to apply for shares to be allotted on an underwriting agreement, a commission being paid for the underwriting, and an authority to receive rents until the principal and interest of a loan have been paid off or to receive money from a third party in payment of a debt, have been held to be irrevocable. On the other hand, an authority is not irrevocable merely because the agent has a special property in or a lien upon goods to which the authority relates, the authority not being given for the purpose of securing the claims of the agent."

In the case of LOON KARAN SETHIYA v. IVAN E. JOHN AND ORS., reported in 1964 Allahabad, 441, the Allahabad High Court has taken a view that the irrevocable power of attorney executed by Loon Karan (debtor of the Bank) authorising the Bank to execute the decree and appropriate the proceeds thereof towards the dues of the Bank, the power of attorney was expressly made irrevocable, but the same was cancelled during the pendency of the execution proceedings adopted by the Bank. Following the first statutory illustration appended to Section 202 of the Contract Act, the Allahabad High Court held that it was a case of tenancy coupled with interest and the power of attorney could not be revoked as it was an irrevocable power of attorney. The matter was taken to the Supreme Court and the Supreme Court in the same case, i.e. LOON KARAN SETHIYA v. IVAN E. JOHN AND ORS., reported in AIR 1969 S.S. 73, took the same view. The relevant portion from para 5 of the Supreme Court judgment is reproduced as under:

> "It is settled law that where agency is created

for valuable consideration an authority is given to effectuate the security or to secure the interest of the agent, the authority can not be revoked."

In the case of BOARD OF REVENUE, MADRAS, REFERRING AUTHORITY v. ANNAMALAI AND CO. (PVT.) LTD. AND ANR., reported in AIR 1968 MADRAS 50, the Full Bench of the Madras High Court considered a reference under the Stamp Act and the question before the Court was as to whether the power of attorney was irrevocable or not till the loan was repaid. The Full Court held that, where the authority granted by the principal to the power agent is coupled with an interest held by the agent, the principles as under would apply:

1. "If a borrower, in consideration of a loan, authorises the lender to receive the rents of Blackacres by way of security, the authority remains irrevocable until repayment of the loan in full has been effected.... This doctrine applies only where the authority is created in order to protect the interest of the agent; it does not extend to a case where the authority has been given for some other reason and the interest of the agent arises later." (Cheshire on the Law of Contracts, 6th Edn. page 421.)

2. Where the authority of an agent is given by deed, or for valuable consideration, for the purpose of effectuating any security, or of protecting or secufing any interest of the agent, it is irrevocable during the subsistence of such security or interest" (Bowstead on Agency, 12th Edn. p.301).

3. Adopting the classical statement of the rule given by Wilde C.J. in Smart v. Sanders, (1848) 5 CB 895 at p.917 (Sic), on the Law of Agency, 2nd Edn. page 802 states:

"In such cases the authority is given for valuable consideration as a security or as part of a security, in respect of a liability of the principal to the agent. The agent has, as it were, bought his

> authority in order to ensure the payment of a debt due from the principal."

It has been then observed in para 6 that the principles thus set out have been embodied in Section 202 of the Indian Contract Act and the reliance has been placed on the statutory illustration (a) under Section 202 of the Contract Act.

In the case of GOUTHAM SURANA & SONS, REPRESENTED BY ITS KARTA GOUTHAMCHAND SURANA v. K. KESHAVAKRISHNAN AND ORS., reported in (1995) BANK JOURNAL 687, the Madras High Court considered the case with regard to revocation of power of attorney with possession of vehicle given in favour of the financier of vehicle to whom liability was admitted. It was held that, when power of attorney is given for interest consideration, it cannot be revoked unless there is a contract to the contrary. The Court also considered the decision of the Supreme Court in the case of Loon Karan Sethiya (supra) and the Full Bench decision in the case of Board of Revenue, Madras (supra). It was categorically observed in para 14 that the power was given to secure an interest and the same could not be revoked as it was irrevocable power coupled with interest and had also been acted upon. The revocation was held to be in complete breach of the terms of the power of attorney and further that the applicant had acquired the interest by virtue of the very authority given to him under the power of attorney and, therefore, the principal could not revoke the same unless there was a contract to the contrary.

13. On behalf of the defendant appellant, the following cases were cited.

In the case of LORD GOVINDDOSS KRISHNADOSS v. VOPESWAR LALJI MAHARAJ AND ANR., reported in AIR 1930 MADRAS 231, it was held that, tenancy created by an ordinary power of attorney for the management of an endowment could be revoked even though the endowment is made for the spiritual benefits of the person creating the endowment and the member of the family including the agent, for such spiritual benefits cannot amount to an interest within the meaning of Section 202.

In the case of DALCHAND v. SETH HAZARIMAL AND ORS., reported in AIR 1932 NAGPUR 34, it was held that, the agent selling cloth and entitled to retain part of the price as remuneration has no interest in the unsold cloth within the meaning of Section 202 of the Contract Act. In the case of

In the case of GARAPATI VENKANNA v. MULLAPUDI ACHUTARAMANNA AND ORS., reported in AIR 1938 MADRAS 542, the Court was concerned with the case of the power of attorney in favour of a stranger to conduct the suit providing that when the property in suit is recovered, he would be entitled to certain share in it. The Court held that such authority was not coupled with interest and Section 202 of the Contract Act does not apply and even if such transaction is champertous third party cannot contend that assignors may have grievance against the assginee. It was held that the principle of Section 202 applies only to cases where the authority is given for the purpose being a security or a part of the security and not to cases where the interest of the donee arises afterwards and incidentally. In such cases, there is no authority coupled with an interest; but an independent authority and an interest subsequently arising.

In the case of MUTHARASU THEVAR v. MAYANDI THEVAR AND ORS., reported in AIR 1968 MADRAS 333, it was held that the principal has the right to have his Counsel to conduct his litigation notwithstanding the fact that the agency in question is irrevocable or not. The agent is engaged as a means to an end. If the principal was to be constrained to continue his litigation through a Counsel not of his choice, not of his liking, it would tantamount to stiffling the prosecution of a lawful suit and certainly, therefore, it will be against public policy. It was further held that, for an agency to be irrevocable, it should create in the agent an interest in the subject matter contemporaneously with the document where such agency is created and it cannot be left to chance or guess or inference.

In SUBHASH CHANDRA JAIN v. FEROZE KHAN AND ORS., reported in AIR 1982 DELHI 114, the Court found that the plaintiff was an agent to be paid a commission every month for exploiting, distributing or exhibiting picture in a particular territory after accrual of net collection. Such plaintiff could not prima facie said to have any interest in the prints of the picture and was not held to be an agent as envisaged by Section 202 of the Contract Act. Therefore, in case of termination of the agency by the principal, the plaintiff could not ask for an injunction to restrain the principal from exploiting or distributing or exhibiting the said picture in the particular territory. Reliance was also placed on the decision of the Nagpur High Court in the case of Dalchand (supra).

In the case of CORPORATION BANK, BANGALORE v. LALITHA H. HOLLA AND ORS., reported in AIR 1994 KARNATAKA 133, it was held that mere use of word 'irrevocable' in a power of attorney will not make the power of attorney 'irrevocable' unless the terms thereof, disclose that it created or recognised an agency coupled with interest in favour of the agent. A power of attorney simpliciter which merely authorised an agent to do certain acts in the name of or on behalfof the executant can be revoked or cancelled by the executant at any time in spite of the instrument stating that the power of attorney is irrevocable. On the other hand, a power of attorney executed in favour of an agent, recording or recognising an interest of the agent/attorney in the property which is the subject matter of the agency, cannot be revoked or terminated, even if the instrument does not state specifically that it is irrevocable, as then it would be a power coupled with an interest.

In M.JOHN KOTAIAH v. A.DIVAKAR AND ORS., reported in AIR 1985 A.P. 30, while dealing with the case of an irrevocable power of attorney in the context of Section 202 of the Contract Act, the Court held that, assignment of interest in subject matter to agent must be simultaneous with creation of power in him and mere description of power of attorney as irrevocable is immaterial. The Court quoted Bowstead on Agency, 14th Edn., p.423 in paras 11 and 12 of the judgment. At the end of para 15 of the judgment, the Andhra Pradesh High Court has quoted from CORPUS JURIS SECNDUM, Vol.2 (Agency), p.1163 as under:

> "The interest to which the agent gets in the estate or property must be simultaneous with the power given him in order to give him a power coupled with an interest and nor this reason an interest in the result of the exercise of the power as distinguished from an interest in the subject matter of the power itself, is insufficient for if the agent's interest exists only in the proceeds arising from an execution of the power, the power and the interest cannot be simultaneous in point of time since the power, in order to produce the interest must be exercised and by its exercise it is extinguished."

14. While in the case at hand, the POA did provide in Clause 13 that it was irrevocable and according to Clause 17 of the MOA, the agreement could not be unilaterally rescinded after the licencee of the second part has been

put into possession of the property, on a critical analysis of the authorities as aforesaid, we find that there is no charm in the use of the word 'irrevocable' and whether the contract could be rescinded and the authority could be revoked would largely depend upon the question as to whether the agency was coupled with the interest or not and as to whether such interest should essentially be pre-existing, that is, independent of the agreement as such. Here is a case in which we find on the basis of the three documents that the main purpose for which the agency was created was the execution of the scheme for constructing dwelling units for weaker sections of the society. With that end in view, the plaintiff respondent was to prepare the scheme and get it sanctioned in accordance with law. It is not the case in which there was any authority like that of conducting a case before the Court or a case of spiritual interest or an agency for exploiting the exhibition of a film. In cases of the agency coupled with the interest, we find that there is ample authority in support of the proposition of law that such interest need not essentially be a pre-existing interest or an interest independent of it. Interest has to be in the subject matter of the agreement. Once it is found that the interest is created in the subject matter of the agreement, may be by the agreement itself, it would still be a case of an agency coupled with interest, such interest may be created simultaneously and by the agreement itself and we also find that in such a case if the rescinding of the contract is held to be permissible, it would frustrate the very purpose for which the agreement was made, obviously, the plaintiff respondent had an interest to see that the scheme is executed. Of course, the scheme could be executed only after it had been sanctioned in accordance with law. Nevertheless, the interest in the execution of the scheme subject to the condition as aforesaid, which was created by the agreement, does create a valuable interest in favour of the plaintiff respondent and on the basis of the principles and on the basis of the ratio of the judicial pronouncements, it is clear that in the case at hand, an agency was created in which the plaintiff respondent had an interest and, therefore, it could not be terminated to the prejudice of such interest in view of Section 202 of the Indian Contract Act. The subject matter of the agency in this case was the preparation and execution of the scheme under Section 21 of the Ceiling Act on the property of the defendant appellant. May be that the plaintiff respondent had no title to such property and he could not claim the ownership nor could he retain the land in question with him, but the matter of substance is

that, a scheme after the statutory sanction was to be executed on this land through the plaintiff respondent and this by itself was a valuable interest in this agency for the purpose of the subject matter of the agency, that is the scheme itself. Thus, we have no hesitation in holding that it is a case of agency coupled with the interest.

15. The second requirement under Section 202 of the Contract Act against the termination of the agency is the absence of an express contract. In this regard, strong reliance has been placed by the learned Counsel for the defendant appellant on Clause 17 of the MOA and an argument was raised that this Clause implies that the agreement could be unilaterally rescinded by either party at any time before the licencee of the second part had been put into possession and admittedly, the plaintiff respondent had never been put into possession of the said property. Except Clause 17, we do not find any Clause in the MOA enabling the principal to rescind the agreement. The argument that Clause 17 impliedly authorises the principal to rescind the MOA, itself shows that there is absence of an express contract. Express contract would mean expressed by words in the terms of the agreement itself. It is the settled principle of law of Interpretation of Statute that, when the Statute itself uses a particular word, such word has to be given its full meaning in contradiction to its negative aspect. By using the word 'express contract' the implied stands automatically excluded and, therefore, the authority to rescind the agreement cannot be by implication on the basis of Clause 17. Clause 17 certainly puts an express embargo against the rescinding of the agreement after the possession is handed over, but this embargo cannot be read to cloth the defendant appellant with an express power to unilaterally rescind the agreement at any time before the possession is handed over and the same cannot be read as an express term of the contract for the purpose of terminating the agreement at any time prior to the possession. Although the learned Counsel for the plaintiff respondent had argued that, apart from the fact that there was no express contract, this Clause does not even impliedly empower the original defendant appellant to rescind the agreement at any time at his whim before the possession is handed over and that unless the scheme was sanctioned under Section 21 of the Ceiling Act, there was no question of handing over the possession and, therefore, this Clause 17 becomes operative only after the scheme is sanctioned and that upto the stage of obtaining the sanction, everything was to be done by the plaintiff respondent and in fact, he by his efforts, had

brought the scheme beyond the stage of approval by the specified authority and at this stage, the rescinding of the MOA could not be brought about by the defendant appellant so as to deny to the plaintiff respondent the fruits of his labour, efforts and industriousness. It was pointedly argued on behalf of the plaintiff respondent that even the implied authority to terminate the agreement on the basis of Clause 17 was not available because Clause 17 itself becomes operative after the handing over the possession and, therefore, at no stage, prior to the handing over of the possession of the property, the so-called implied authority on the basis of Clause 17 could be acted upon and given effect too. That may or may not be so, but the fact of the matter in the instant case is that, there is a total absence of an express term of contract. The learned Counsel for the defendant appellant cited the case of STATE OF RAJASTHAN v. RAGHUBIR SINGH AND ORS., reported in AIR 1979 S.C. 852. In this case, the Supreme Court was concerned only with a term of the agreement, i.e. neither the earnest money deposit nor the withheld amount shall bear any interest. The Supreme Court found that the provision of non-entitlement of the interest on the withheld amount implied that the interest was claimable on other amount. It was not a case with regard to the termination of the agency or the agreement itself. It was only a question of interpretation of one of the clauses relating to the claim under the agreement with regard to interest. Here is a case in which the rescinding of the contract itself is sought to be defended on the basis of an implied authority on the basis of one of the clauses of the agreement and therefore, this authority is of no avail to the plaintiff appellant to show that there was any express contract for the purpose of termination of the agency. We thus find that the second requirement under Section 202 of the Contract Act, that is the absence of an express contract is clearly obtaining in the facts of this case.

16. Once we find that it was a case of agency coupled with the interest, and there is total absence of an express contract for the purpose of termination of the agency, the question arises as to what will be the effect of the death of the defendant appellant and as to whether the agreement can be said to have come to an end or automatically terminated and authority stands revoked by the death of the principal during the pendency of the suit on 1.9.1988.

17. Under Clause 2 of the MOA, the plaintiff respondent was appointed, constituted and nominated as

the true and lawful attorney by the owner, that is the defendant appellant and on his behalf to do or cause to be done all acts required for the purpose of execution of the said scheme and in regard to the said property. This power of attorney was described to be irrevocable till the whole scheme is carried out. In the POA, after Clause 13 saying that the power of irrevocable till the scheme is finally carried out and executed as per the agreement dated 24th March 1977, the owner, i.e. the defendant appellant mentioned that he for himself, his heirs, executors and administrators ratifies and confirms and agree to ratify and confirm whatsoever the said attorney or any substitute or substitutes acting under him shall do or purport to do or cause to be done by virtue of this presents. Firstly, by the very nature of the MOA read with POA and the ACD, we find that the parties had agreed for the execution of the scheme for the welfare of the members of the weaker sections. The scheme was required to have a statutory sanction and the carrying out of the scheme could not be intended to cease on account of the unfortunate death of the owner. It appears that no termination can be brought about even on account of the death as is clearly provided in the statutory illustrations given under Section 202 of the Contract Act. In Halsbury's Laws of England, 4th Edition, Vol.1, at page 524 in para 872, it is mentioned as under:

"Powers of attorney. Where a power of attorney is expressed to be irrevocable and is given to secure a proprietary interest of the donee or the performance of an obligation owed to the donee, the power is irrevocable either by the donor without the consent of the donee or by the death, incapacity, bankruptcy, winding up or dissolution of the donor, so long as the donee has the interest or the obligation remains undischarged. A power of attorney given to secure a proprietary interest may be given to the person entitled to the interest and persons deriving title under him to that interest, and those persons will be the duly constituted donees of the power for all the purposes of the power, without prejudice to any right to appoint substitutes given by the power."

18. In Bowstead and Reynolds on "Agency", 16th Edition, at page nos.660-661, it has been mentioned that the authority expressed to be irrevocable is not determined by death etc. In Chitty on "Contract", 27th Edition, Vol. 2, page 94-95, the learned Author while dealing with the 'Termination of Authority' has commented that,

if there is an interest coupled with the authority, that is, if the agreement is entered into by Deed or on sufficient consideration, whereby an authority is given for the purpose of providing a security, such an authority is irrevocable even by death, etc.

19. No doubt, in the case of Garapati Venkanna (supra), the Madras High Court had held that, where a power of attorney has been executed by several principals in favour of a person and one of the principals having distinguished interest in subject matter of power of attorney dies, the death terminates the power of attorney. This view was was taken by the Madras High Court because, the Court found that there was no authority coupled with an interest and, therefore, the argument raised on the basis of Section 202 of the Contract Act could not prevail. Here is a case in which we have already held as above that it was a case of an agency coupled with interest. In our opinion, the position of law with reference to Section 202 of the Contract Act is, therefore, very clear that the cases in which the agency is coupled with interest and there is no express contract for termination, there cannot be any termination even by death and, therefore, the factum of death of the principal during the pendency of the suit cannot lead to the termination of the agency. The necessary ingradients required under Section 202 of the Contract Act so as to hold that the agency could not be terminated in the facts of the present case are therefore, clearly established and we also find that even the factum of death of the principal cannot bring about the termination of the agency.

20. On the basis of Clause 18 of the MOA, the learned Counsel for the defendant appellant argued that there was no concluded contract. In our opinion, an agreement cannot be said to be incomplete merely because further agreement is required as has been commented by Chitty on "Contracts", 27th Edition, Vol.1, General Principles, in para 2-092, at page 143. It has been commented that, sometimes the Courts give effect even to an agreement which provides for further terms to be agreed. While referring to FOLEY v. CLASSIQUE COACHES LTD., (1934) 2 KB1, 10, it has been mentioned that the plaintiff owned a petrol pump filling station and adjoining land. He sold the land to the defendants on condition that they should enter into an agreement to buy petrol for the purpose of their motor coach business exclusively from him. This agreement was duly executed, but the defendants broke it and argued that it was incomplete because it provided that the petrol should be bought at a price to be agreed

by the parties from time to time. This argument was rejected by the Court of Appeal and it was held that in default of agreement, a reasonable price must be paid. The agreement was contained in a stamped document; it was believed by both the parties to be binding and had been acted upon for a number of years. In this regard, reference may also be made to the case of GRANIT S.A. v. BENSHIP INTERNATIONAL INC., reported in (1994) 1 LLOYD'S LAW REPORTS 526 cited on behalf of the plaintiff respondent, in which case also, similar view was taken.

21. In this view of the matter, the argument of the learned Counsel for the defendant appellant, based on Clause 18 of the MOA that there was no concluded contract and hence not enforceable, cannot be accepted. The inclusion of such Clauses in this type of agreements is quite usual and such Clauses are added only to meet the contingencies and exigencies which may not be conceived at the time of the agreement and which may arise for reasons beyond the control and comprehension of the parties or for the purpose of taking the object of the agreement to its logical end. Therefore, it cannot be held that there was no concluded or enforceable contract between the parties.

22. On the factual aspect, the learned counsel for the defendant appellant submitted that there was a total absence of knowledge of the schemes so far as the original defendant is concerned and he was not at all aware of the schemes prepared and submitted by the plaintiff while the case of the plaintiff - respondent is that all the schemes were prepared with consent, knowledge and authority of the original defendant and copies of the schemes were furnished by the plaintiff respondent to the defendant - appellant. There is no dispute about the execution of MOA, POA and the ACD and the signatures of the parties thereon. We find that the plaintiff had deposed that Maharaja had kept with him 3 to 4 copies, his signatures appear thereon i.e. the scheme dt.15.3.77, that revised scheme was shown to Maharaja and, thereafter, two copies were given to Maharaja. It is with regard to the scheme dt. 15.3.77. With regard to the scheme dt.6.2.78 it has been stated that the copies of both were given to Maharaja Saheb. Two copies of the scheme dt.5.1.79 had been handed over to Maharaja Saheb and the copy of the Map produced alongwith the scheme dt.5.1.79 was also given to the Maharaja and that the copy of the scheme dt. 29.1.79 had also been given to the Maharaja. He has also stated that he met Maharaja in person alongwith the papers relating to sanction granted by the specified authority, two

photostat copies of the said letter were given in person to him and Maharaja became very happy. On the basis of the deposition made by the plaintiff it is also found that consent had been given by him to present the scheme and he had given the copies of all the schemes to Maharaja. We find that on the basis of the material and evidence available on record, in the facts and circumstances of this case, it cannot be said that the original defendant was kept in dark about the schemes or that he did not know or was not aware with regard to the schemes and revised schemes, as had been submitted by the plaintiff. The first scheme was submitted on 15.3.77 by the original defendant himself and it also bears his signature. It is also on record that on 22.3.78 the constituted power of attorney of the original defendant had himself appeared before the competent authority and had also moved an application praying for the sanction of the scheme. On the basis of the material available on record, in the facts and circumstances of this case and looking to the position, standing and elite background of the original defendant - appellant, we find it unbelievable that the defendant - appellant could remain unaware of the schemes which had been presented by the plaintiff - respondent before the Ceiling authorities and that he was kept in dark and therefore on this ground also the MOA could not be rescinded. Once the plaintiff respondent was to act on the basis of the POA to discharge his obligations under the MOA, it cannot be said that he had no right to submit the scheme or to revise the same to seek the sanction. It stands fully explained that the schemes had to be revised and submitted from time to time because of the guidelines which were issued by the State Government and the Central Government and the last alternative scheme which was submitted on 29.1.79 had to be submitted because of the practical aspects and because the authorities had desired that instead of a scheme of great magnitude there must be a scheme which is feasible. We do find that in the 5th scheme the number of dwelling units had been reduced while the area which had been earlier mentioned has been kept as such. But in this regard, the learned counsel for the plaintiff respondent has explained that in the 5th and final scheme all the dwelling units were to be constructed on the ground floor whereas earlier when the number of dwelling units were more the plan was for more than one storied construction. In any case, this may again be a matter for consideration of the competent authority while taking the final decision but merely because more than one schemes were submitted, it cannot be read against the plaintiff respondent that he failed to discharge his obligations and whereas 31.3.79 was the

last date for the submission of the scheme, beyond which no scheme could be submitted by any one, the only scheme which remains is the scheme dt.29.1.79. We also noticed that the notice with regard to the termination of MOA, revoking of the power of attorney and conveying that ACD was inoperative etc. had been given after the expiry of the last date for submission of the scheme i.e. 31.3.79. Thus there was no fact situation obtaining in this case so as to warrant rescinding of the MOA or the revoking of the POA and to say that the ACD had ceased to be operative, merely because a bald allegation has been made that the draft of this ACD had been prepared by the plaintiff respondent and the defendant -appellant had only signed it. On factual aspect of the matter, there was no scope for the defendant - appellant to wriggle out of these three documents by way of rescinding the MOA or revoking the POA and to say that the ACD had ceased to be operative.

23. Coming to the readiness and willingness on the part of the plaintiff - respondent to discharge his obligations under the MOA we find that right from beginning he had shown interest in the Scheme, had also contacted the Institutions where from the funds could be mobilized and even till last he had taken the necessary steps by submitting the Schemes so as to meet the objections of the authorities and had also incurred the necessary expenditure and from his side he has made full endeavour to see that the Scheme is taken to its logical end. In such cases when guidelines are changed or modified, guidelines by the Central Govt. are received and apart from the authorities under the Ceiling Act, there is an involvement of Municipal Corporation, Town Planning Deptt. etc. no foolproof scheme may have been conceived in the first instance and even if conceived, prepared and submitted, it could always be revised to meet the objections. We fail to understand as to how the submission of more than one schemes could be said to be the lack of readiness and willingness on the part of the plaintiff - respondent. We also find that there was no such deliberate attempt on the part of the plaintiffrespondent to play either with the identity or the measurements of the land in question. He had acted on the basis of the details and documents furnished to him by the original defendant himself and was open to all suggestions and corrections and willing to meet all objections to see that the scheme goes through. If at all any incorrect data was set out in any of the earlier schemes, that is, prior to the scheme dated 29th January 1979, it was the result of the contents of the scheme dated 15th March 1977 and the accompanying plans which

had been signed by none else, but the original defendant himself. The plaintiff respondent still maintains that no construction was proposed on the reserved areas, the land reserved for bus stand, stadium and sports complex was not to be utilised for the purpose of construction, and the notification dated 16th January 1978 stood repealed on 1.2.1978 and was not saved under Section 124(2) of the Gujarat Town Planning Act, 1976. It is a different matter that when the scheme reached beyond the stage of approval by the specified authority there was a dispute resulting into this litigation and the matter could not proceed further smoothly. In fact we find this argument of learned Counsel for the defendant- appellant to be incomprehensible.

24. The learned Counsel for the defendant appellant submitted that the objection which has been raised against the validity, legality, correctness and propriety of the scheme/schemes submitted by the plaintiff respondent should also be read against the plaintiff respondent's readiness and willingness. In our opinion, such objections cannot be read against the readiness and willingness of the plaintiff respondent.

25. In the facts of this case, we also find that on the basis of the three documents as aforesaid, the plaintiff respondent had acted upon the agreement in preparing and submitting the schemes and had also made efforts to mobilise funds from the financial institutions in case the scheme is sanctioned and in doing so, he had also made initial investments and had thus acted on the representation of the original defendant and we could not find any justification with the original defendant for rescinding the agreement on the basis of his objections against the scheme which are to be considered by the concerned authorities. On the basis of his objections against the scheme, it cannot be pleaded on behalf of the defendant appellant that there cannot be any estoppel against law. As a matter of fact, on the question of estoppel, the plea that there cannot be estoppel against law, does not arise in the facts of this case for the purpose of rescinding the MOA and revoking POA and thus, the original defendant appellant was estopped from rescinding the agreement, from revoking POA and from saying that the ACD had ceased to be operative. Once the documents are executed, the natural consequences have to follow and the documents cannot be said to have ceased to be operative unless and until it is shown that any fraud was practised or that the signatures were not genuine. There is nothing on record to show that these documents were got executed by playing any fraud and it is nobody's

case that the documents were not executed, rather it is admitted that the documents had been executed and they had been duly signed.

26. On consideration of the law laid down in the aforesaid authorities, as has been discussed above, and applying the same to the facts of the present case, we find that the MOA could not be rescinded, the POA could not be revoked and the ACD did not cease to be operative. In view of this conclusion arrived at by us, on first question formulated in para 11, no interference is warranted in respect of issues Nos.1 to 11, 14, 15, 20 and 21.

27. Now for the second question, it is to be considered as to whether it is a case for specific performance of the contract. The learned counsel for the defendant - appellant submitted that the area which was available as residential had ceased to be the area for residential purposes and under the latest plan it was the open space. Therefore, it had now become impossible to perform the contract since the scheme has to be in conformity with the master plan for the development of the city and once the land is to be kept as a open space under the master plan, there was no occasion to go ahead with the performance of the contract and as such it is no case for the order of specific performance. He has submitted that it was an agreement for a development scheme and it was dependent on the contingency of the scheme being sanctioned by the authorities under the Ceiling Act in accordance with law. Whereas the area in question is not available for residence and it has to be kept as open space, the Ceiling authorities cannot permit the sanction contrary to law and in disregard of the master plan. He has also referred to S.14 of the Specific Relief Act and has submitted that it is a case of contract for the non performance of which compensation in money is an adequate relief and that it is a contract which runs into minute and numerous details, it is a contract the performance of which involves the performance of a continuous duty which the court cannot supervise. As against it, the learned counsel for the plaintiff - respondent has submitted that so far as the question as to whether a land is a vacant land for the purpose of S.21 or not is concerned, it has to be considered as on the date when the rights of the parties became crystallized. Such date is 17.2.1976 in the instant case and, therefore, merely because the master plan has been amended and modified later on and the space has been shown as open space, it cannot be said that the permission cannot be given for the purpose of dwelling

units on such space. Even if the master plan has been modified, if a land was the excess vacant land at the time when the Act came into force, it would continue to be the vacant land and neither the Government can increase the area of such land nor any holder can decrease the same.

In this regard, strong reliance was placed by the learned Counsel for the plaintiff respondent on SMT. ATIA MOHAMMADI BEGUM v. STATE OF U.P. AND ORS., reported in AIR 1993 S.C. 2465. In this case, the competent authority had declared that the appellant had 19813.83 sq.mtrs. of vacant land in Aligarh in excess of the ceiling limit, but the District Judge reduced the area of the excess land to 6738.23 sq.mtrs. Against the order of the District Judge, both the sides filed writ petitions before the High Court. The High Court dismissed the appellant's writ petition and partly allowed the writ petition of the State Government. Against the decision of the High Court, the appellants filed Special Leave Petitions before the Supreme Court and the restoration of the District Judge's order was sought. In para 2 of the judgment, the Supreme Court has mentioned that the High Court set aside the District Judge's order on the construction it made of explanation (C) in Section 2(o) defining 'urban land' in the Ceiling Act. The definition of 'urban land' in Section 2(o) excludes from its ambit, land which is mainly used for the purpose of agriculture. Thereafter, the Explanation for the purpose of Clause (o) defining 'urban land' and Clause (q) defining 'vacant land' is given. In para 3 of the judgment, it has been observed that there is no dispute that the Act came into force in the State on 17.2.1976 and there was no master plan for that area in Aligarh at that time. However, a master plan for Aligarh was made on 24.2.1980 wherein the land in dispute was shown. The High Court had taken a view that the land of the appellant could not be treated as mainly used for the purpose of agriculture by virtue of Explanation (C) because it was shown in the master plan made on 24.2.1980. The correctness of this view had been challenged before the Supreme Court. The Supreme Court, after considering the relevant provisions of the Act and while referring to Section 3 of the Act, observed that Section 3 enacts that except as otherwise provided in the Act, on and from the commencement of the Act, no person shall be entitled to hold any vacant land in excess of the ceiling limit. The Supreme Court has observed as under:

"Accordingly, the right of the person to hold any

> vacant land in excess of the ceiling limit ceased on the date of commencement of the Act even though determination of the excess area had to be made under the machinery provisions, thereafter, in accordance with the prescribed procedure. The area of vacant land in excess of the ceiling limit held by the appellant has, therefore, to be determined as on 17.2.1976 when the Act came into force in the State of Uttar Pradesh. Clause (a) of Section 2 defines 'appointed day' to mean the date of introduction of the Bill in Parliament in relation to any State to which this Act applies in the first instance like the State of Uttar Pradesh and that date is 28.1.1976. Section 5 of the Act provides that any transfer made of vacant land in excess of the ceiling limit at any time during the period commencing on the appointed day and ending with the commencement of this Act shall be ineffective and the land so transferred shall be taken into account in calculating the extent of vacant land held by such persons. This is a further indication that determination of the area of vacant land in excess of the ceiling limit under the Act is to be made with reference to the date of commencement of the Act and the right and liability of the holder of the land for this purpose under the Act crystallises on the date of commencement of the Act unaffected by any subsequent events."

The Supreme Court thus found that the scheme of the Act supports the construction that the Explanation (C) means that, if the land had been specified in the master plan existing at the time of the commencement of the Act for a purpose other than agriculture, this land shall not be deemed to be mainly used for the purpose of agriculture by virtue of the Explanation and not if the land is specified in a master plan prepared after the commencement of the Act, the plain language of Explanation (C) bears this construction and requires to be so construed in order to harmonise it with the other provisions and scheme of the Act. The view has been clearly expressed by the Supreme Court that just as the holder of the land cannot by his subsequent action decrease the area of the vacant land in excess of the ceiling limit, the authorities too cannot by any subsequent action increase the area of the excess vacant land by a similar action. It has also been expressed in no uncertain terms that the 'master plan' defined in Section 2(h) and referred in the definition of 'urban land' in Section 2(o), including Explanation (C) therein,

is obviously a master plan prepared and in existence at the time of commencement of the Act when by virtue of Section 2 of the Act, rights of the holder of the land under the Act get crystallised and extinguish his right to hold any vacant land in excess of the ceiling limit. The proceedings for determining the vacant land in excess of the ceiling limit according to the machinery provisions in the Act is merely for quantification, and to effectuate the rights and liabilities which have crystallised at the time of commencement of the Act.

This judgment fully supports the contention which has been raised on behalf of the plaintiff respondent and, therefore, if there was any excess vacant land on 17.2.1976, it continues to be so and if at that time it was meant for residential purpose, the construction of residential units on such land cannot be said to be forbidden by any law merely because in the subsequent master plan it has been shown to be open space. The rights of the parties were crystallised on the date of the commencement of the Act and such rights have to remain unaffected by the subsequent events. What is permissive and what is not permissive has to be considered differently qua any provision of law prescribing a positive prohibition as a legal impediment.

Reliance was placed on STATE OF GUJARAT AND ORS., ETC. vs. PARSHOTTAMDAS RAMDAS PATEL AND ORS., reported in AIR 1988 S.C. 220, by the learned Counsel for the plaintiff respondent, in which the disputed vacant land was included in the Town Planning Scheme. In this case, the Supreme Court examined the view taken by the High Court treating Section 29(1)(a) of the Bombay Town Planning Scheme, 1954 as building regulation within the meaning of that expression used in sub-clause (i) of Clause (q) of Section 2 of the Act that the ban contained in Clause (a) of Section 29(1), Bombay Town Planning Act, 1954 brought the lands in question within sub-clause (i) of Clause (q) of Section 2 of the Act. Assuming Section 29(1)(a) to be a building regulation, the Supreme Court found that it could not be said that the construction of buildings on the land in question was not at all permissible; Section 29(1)(a) of Bombay Town Planning Act, 1954 only required a person who owned a piece of land situated within an area included in the scheme to obtain the permission from the local authority before erecting or constructing any building or pulling down or altering any building as provided therein and that it could not be said that the land was one on which the construction of building was not permissible; the embargo in question was not total and that it was only where the

ban was complete that it could be said that no construction was permissible on the land.

28. The learned Counsel for the defendant appellant pointed out that the decision in Smt.Atia Mohammadi Begum (supra) has been referred to a larger Bench and the same is on the Board for daily hearing before the Supreme Court. That may be so, but, as on today, the aforesaid decision holds the field and is law of the land and it is not open for this Court to ignore the same or to take a view which may not be in conformity with the Supreme Court decision holding the field.

29. Faced with this situation, the learned Counsel for the defendant appellant submitted that the Supreme Court decision in Smt.Atia Mohammadi Begum (supra) is per incuriam and no authority can pass any order so as to sanction a scheme contrary to the master plan and the master plan has to be adhered to.

On the question of applicability of the principle of the judgment per incuriam, we may refer to MAMLESHWAR PRASAD AND ANR., v. KANAHAIYA LAL (DEAD) THROUGH L.RS., reported in AIR 1975 S.C. 907, wherein the submission that a judgment per incuriam binds none except the particular parties to the lis was considered. It was observed in para 9 of the judgment by the Supreme Court as under:

"We need not debate in the present case, this fresh ground to undermine otherwise conclusive judgments for other paramount rules governing justice administration prevail, as earlier indicated. But it is extremely significant that this facile theory was frowned upon by the House of Lords in Cassel & Co. Ltd. v. Broome, (1972) 1 All ER 801 = (1972) 2 WLR 645. In that case the highest Court, viz., the House of Lords

"rejected in condemnatory terms the Court of Appeal's decision of the House of Lords in Rookes v. Barnard (1964 AC 1129) on the issue of exemplary damages had been reached per incuriam because of two previous decisions of the House. Lord Hailsham, L.C., in the course of the leading speech for the majority, asserted that

'it is not open to the Court of Appeal to give gratuitous advice to judges of first instance to ignore decisions of the House of Lords in this way'

while Lord Reid took the view that it was 'obvious that the Court of Appeal failed to understand Lord Devlin's speech'. The per incuriam principle is of limited application. Very few decisions have subsequently been regarded as having been reached per incuriam and in Morelle v. Wakeling, (1955) 2 QB 379 a Master of the Rolls stated that such instances should be 'of the rarest occurrence', and should be limited to 'decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned'. Thus the doctrine will not be extended to cases which were merely not fully argued or which appear to take a wrong view of the authorities or to mis-interpret a statute."

The learned Counsel for the defendant appellant has placed reliance on paras 7 and 8 of the case of MAMLESHWAR PRASAD AND ANR., v. KANAHAIYA LAL (DEAD) THROUGH L.RS. (supra), and the same are reproduced as under:

"7. Certainty of the law, consistency of rulings and comity of courts -- all flowering from the same principle -- converge to the conclusion that a decision once rendered must later bind like cases. We do not intend to detract from the rule that, in exceptional instances, where by obvious inadvertence or oversight a judgment fails to notice a plain statutory provision or obligatory authority running counter to the reasoning and result reached, it may not have the sway of binding precedents. It should be a glaring case, an obtrusive omission. No such situation presents itself here and we do not embark on the principle of judgment per incuriam.

8. Finally it remains to be noticed that a prior decision of this Court on identical facts and law binds the Court on the same points in a later case. Here we have a decision admittedly rendered on facts and law, indistinguishably identical, and that ruling must bind."

In the case of STATE OF U.P. AND ANR., v. SYNTHETICS AND CHEMICALS LTD., AND ANR., reported in (1991) 4 SCC 139, the doctrines of per incuriam and sub-silentio are explained and it was held that they

operate as exception to the rule of precedent and that in case decision is not expressed, nor founded on reasons nor preceding on consideration of the issue, it cannot be deemed as law declared. In para 39 of the judgment, while referring to the case of SYNTHETICS AND CHEMICALS LTD. v. STATE OF U.P. (1990) 1 SCC 109, it was observed that, the question was if the State Legislature could levy vend fee or excise duty on industrial alcohol. The Bench had answered the question in negative as industrial alcohol is unfit for human consumption. The State Legislation was incompetent to levy any duty of excise. While doing so, the Bench recorded the conclusion. Honourable R.M.Sahai, J., in his concurring judgment has observed that the conclusion was not preceded by any discussion, no reason or rationale could be found in the order and this gives rise to an important question if the conclusion is law declared under Article 141 of the Constitution or it is per incuriam and is liable to be ignored. In para 40 of the judgment, it has been observed that, 'incuria' literally means 'carelessness'. In practice per incuriam appears to mean per ignoratium. It cannot be said that in Smt. Atia Mohammadi Begum (supra), the conclusion is not preceded by any discussion and that the adjudication therein is not based on any reason or rationale so as to say that the judgment is per incuriam.

MUNICIPAL CORPORATION OF DELHI v. GURNAM KAUR, reported in AIR 1989 S.C. 38, was a case in which the consent order was passed and the Supreme Court observed that the High Court should not follow it as a precedent. Precedents sub silentio and without argument are of no moment. The Supreme Court has held in para 11 that pronouncements of law which are not part of the ratio decidendi are classed as obiter dicta and are not authoritative. A decision should be treated as given per incuriam when it is given in ignorance of the terms of a statute or of a rule having the force of a statute. It has also been considered as to how the concept of sub silentio had been explained by Prof. P.J. Fitzgerald, Editor of the Salmond on JURISPRUDENCE, 12th Edn., by saying that, when the particular point of law involved in the decision is not perceived by the court or present to its mind, in the technical sense, it will be a case of decision sub silentio. The chief reason for the doctrine of precedent is that the matter which has been fully argued and decided should not be allowed to be reopened. Mere casual expressions carry no weight.

J.K. INDUSTRIES LTD. AND ORS., v. CHIEF INSPECTOR OF FACTORIES AND BOILERS AND ORS., reported in

(1996) 6 SCC 665 is a case in which the Supreme Court has held in para 23 that, it is not fair and proper to read a sentence from the judgment of this Court, divorced from the complete context in which it was given and to build up a case treating as if that sentence is the complete law on the subject.

30. On the basis of the authorities as aforesaid, it cannot be said that Smt. Atia Mohammadi Begum (supra) has been decided per incuriam. The view has been taken after considering the entire scheme of the Act and the arguments which were raised have been completely dealt with and hence, there is no question of diluting the effect of the judgment of Smt. Atia Mohammadi Begum (supra).

31. The master plan relevant for the purpose was the master plan which was in force on the date when the Ceiling Act came into force. The development plan modified and finalised by notification dated 21.9.1970 was in force and the lands of Laxmi Vilas Estate were in residential zone. Therefore, neither the proposal dated 17th May 1975 nor the notification dated 16th January 1978 could adversely affect the legal efficacy of the development plan which was in force on 17th February 1976. By notification dated 16th January 1978 issued under Section 10-A of the Bombay Town Planning Act, 1954, the said final development plan was sought to be varied with effect from 15.3.1978 and the lands of Laxmi Vilas Palace Estate which were meant for residential use in the final development plan dated 21.9.1970 were to be reserved as open space under Section 7(b) of the Bombay Town Planning Act, 1954 could therefore be used for any public purpose such as the construction of dwelling units for weaker sections with the permission of authorities as the land in question continued to be vacant land for the purpose of Section 21 of the Ceiling Act. In fact, the Bombay Town Planning Act, 1954 was repealed on 1.2.1978 and on such repeal, the rules and notifications thereunder stood automatically repealed unless the same could be specifically saved under Section 124 of the Gujarat Town Planning Act. Accordingly, notification dated 16th January 1978 stood repealed on 1st February 1978 and it cannot be said that it was saved under Section 124 of the Gujarat Town Planning Act. In fact, we find that the State Government itself had taken view as back as on 31.3.1979 (Exh.1161 at page 250, Vol.26 of the paper book) that is, at a point of time when the parties were not at dispute, that the notification providing reservation of the said land for open space did not affect the scheme and the scheme should be examined

on merits without reference to the notification dated 16th January 1978.

In Special Civil Application No. 2739 of 1992 decided on 27th December 1993, a Single Bench (Coram: R.K.Abichandani, J.) of this Court noticed the provisions of Sections 26 and 27 of the Act while considering the question as to whether the Corporation could without anything more and simply on the ground that the land is reserved for a public purpose reject the application for the development to have the effect of suspending all rights in respect of such land for a period of ten years even if no acquisition proceedings had commenced and held that Section 26 only imposes a restriction on development by making it compulsory to obtain the permission in writing from the concerned appropriate authority and that it does not lay down that no permission shall be applied for in respect of the area covered under reservation for public purpose and an application under Section 27 would be in conformity with the development plan in case an application is made for development permission on the ground that the land is not immediately needed for the use for which it was ear -marked and undertake to develop the same subject to its being taken away for the purpose for which it is reserved. It was also held that the necessary conditions could be imposed while granting such permission if the land is ultimately required for the purpose for which it was shown as reserved. Accordingly, the impugned orders in that case which were passed on the footing that mere reservation for a public purpose under Section 12(2)(b) of the Act disqualifies the owner from seeking permission were not sustained and the petition was allowed. This decision of the learned Single Judge was confirmed by the Division Bench in Letters Patent Appeal No. 55 of 1994 and also by the Supreme Court in Special Leave Petition No. 18696 of 1994. The Supreme Court noted the contention that the land in question had been reserved in the development plan for a slaughter-house to be constructed by the Municipality and in view of the said reservation, no permission for development at the hands of a third party, including the owner of the lands, could be granted for a purpose, which is at variance with the purpose of the reservation and passed the following order, while disposing of the Special Leave Petition:

> "We need not express any opinion on this submission, inasmuch as we do not read the judgment either of the learned Single Judge or of the Division Bench as compelling the Municipality to do something which is contrary to law. In

fact, this aspect has been made clear by the Division Bench itself. The only direction made by the Division Bench is for a re-consideration of the matter. It is obvious that re-consideration shall be in accordance with law.

In this view of the matter, the Municipality can have no legitimate grievance against the order of the Division Bench. The Special Leave Petition is disposed of with above directions."

In AHMEDABAD URBAN DEVELOPMENT AUTHORITY v. MANILAL GORDHANDAS AND ORS., reported in AIR 1996 S.C. 2804, it was noticed that the Corporation had submitted the development plan to the State Government for sanction on 15th January 1976 and on 19th June 1976, the Gujarat Town Planning and Urban Development Act, 1976 was enacted which came into force on 1.2.1978 and the Bombay Town Planning Act was repealed since that date and simultaneously, in exercise of the powers under Section 22, the Ahmedabad Urban Development Authority was constituted. In para 11 of the judgment, it was observed by the Supreme Court as under:

"We are not able to appreciate as to why and how the draft revised development plan which had been submitted by the Corporation on 15.1.1976, was sanctioned and notified on 12.8.1983, when in the meantime the Gujarat Town Planning Act had come into force with effect from 30.1.1978, which had jurisdiction even over the area in respect of which the Corporation had submitted the draft development plan on 15.1.1976. Apart from that before the aforesaid notification dated 12.8.1983 was issued, the appellant had submitted its draft development plan prepared in accordance with the provisions of the Gujarat Town Planning Act to the State Government for sanction, covering even the area which had been included in the draft development plan submitted by the Corporation, on 15.1.1976, along with the much larger area for which the draft development plan was prepared by the appellant. In normal course, the State Government should not have taken note of the draft development plan submitted by the Corporation on 15.1.1976, which remained pending before the State Government and in the meantime the Gujarat Town Planning Act came into force and a more comprehensive draft development plan prepared by the appellant had been submitted to the State Government covering even the area for

which the Corporation had submitted a draft development plan."

In para 12, it was further observed as under:

It can be said that there was complete lack of application of mind on the part of the State Government when the draft development plan submitted on 15.1.1976, by the Corporation was sanctioned under the provisions of the Gujarat Town Planning Act on 12.8.1983, over-looking the fact that in the meantime a comprehensive draft development plan had been prepared by the appellant and had been submitted on 23.7.1981, for sanction of the State Government. When Section 17(1) vests power in the State Government to sanction the draft development plan, the said statutory power should not be exercised in a casual manner without proper application of mind."

32. The Supreme Court has thus clearly laid down that with the coming into force of the Gujarat Town Planning Act and in view of sub-section (2) of Section 124 of the Gujarat Town Planning Act, the application which had been submitted by the Corporation could not be sanctioned after the repeal of the Bombay Act, in view of the inconsistency between the provisions of Sec.9 to 10 of the Gujarat Town Planning Act and Sec.7 to 10 of the Bombay Town Planning Act.

33. The argument of the learned Counsel for the defendant appellant against the applicability of the law laid down by the Supreme Court in Smt. Atia Mohammdi Begum (supra) that the Supreme Court had only developed the test for limited purpose of computing the land of holding on a given date and, therefore, it cannot be said to have considered the question about the relevancy of the master plan and the development of the land in accordance with the development plans and that the land is to be developed as a vacant land etc. In this regard, a reference may straightway be made to SMT. SOMAWANTI AND ORS., v. STATE OF PUNJAB AND ORS., reported in AIR 1963 S.C. 151 in which an argument was raised that, while deciding a matter, if certain contentions were not raised and considered, such decision cannot be taken as an authority to decide in respect of contentions or arguments. In para 22 of the judgment, the Supreme Court has observed as under:

"It is sufficient to say that though this Court

may not have pronounced on this aspect of the matter we are bound by the actual decisions which categorically negative an attack based on the right guaranteed by Art.19(1)(f). The binding effect of a decision does not depend upon whether a particular argument was considered therein or not, provided that the point with reference to which an argument was subsequently advanced was actually decided. That point has been specifically decided in the three decisions referred to above."

In the case of BALLABHDAS MATHURDAS LAKHANI AND ORS., v. MUNICIPAL COMMITTEE, MALKAPUR, reported in AIR 1970 S.C. 1002, it was considered by the Supreme Court as to whether the question under consideration was concluded by the earlier judgment of the Supreme Court in the case of BHARAT KALA BHANDAR v. MUNICIPAL COMMITTEE OF DHAMANGAON, reported in (1966) S.C. 249. The High Court had observed as under:

"We are bound to follow the decision in Bharat Kala Bhandar v. Dhamangaon Municipality, 1965-3 SCR 499 = (AIR 1966 SC 249) but in view of the fact that the relevant provisions were not brought to the notice of the Court and in view of the fact that the decision in Firm Radha Kishan's case, (AIR 1963 SC 1547) holds that the remedy provided by similar provisions is adequate and a suit does not lie, we are constrained to hold that under the Act the suit is incompetent."

The High Court had set aside the decree for refund of the tax and confirmed the injunction restraining the Municipality from recovering the tax and, therefore, with the certificate which was granted by the High Court under Article 133(1)(c) of the Constitution, the appeal was preferred before the Supreme Court. In para 4 of the judgment, the Supreme Court while dealing with the first question as to whether a suit for refund of tax paid to the Municipality is maintainable held that this question was concluded by the Bharat Kala Bhandar's case (supra). The Supreme Court has observed as under:

"That case arose under the C.P. & Berar Municipalities Act, 1922. The right of a Municipality governed by that Act to levy under Section 66(1)(b) a tax on bales of cotton ginned at the prescribed rate was challenged by a taxpayer. This Court held that levy of tax on cotton ginned by the taxpayer in excess of the

> amount prescribed by Article 276 of the Constitution was invalid, and since the Municipality had no authority to levy the tax in excess of the rate permitted by the Constitution, the assessment proceedings levying tax in excess of the permissible limit were invalid, and a suit for refund of tax in excess of the amount permitted by Article 276 was maintainable. The decision was binding on the High Court and the High Court could not ignore it because they thought that "relevant provisions were not brought to the notice of the Court"."

In NAJUDDIN KARIMUDDIN SHAIKH v. COMMISSIONER OF POLICE, SURAT & ORS., reported in 30(2) GLR 988, a Division Bench of this Court while dealing with the Law of Precedent and binding effect of the judgment of the Supreme Court held that, it is not possible for any Court to refuse to follow the judgment of the Supreme Court on the ground that had a particular provision of law been brought to the notice of the Supreme Court, that Court would have taken a different view. Similarly, in the case of VALLURI RAMANAMMA v. MARINA VIRANNA, reported in 88 BOMBAY LAW REPORTER 707, it was held that the Supreme Court judgment cannot be disregarded on such grounds.

34. In view of the position of law as it emerges from the various authorities as above, we find that the decision rendered by the Supreme Court in Smt. Atia Mohammadi Begum (supra) cannot be ignored or cannot be held to be inapplicable to the facts of the present case on any of the grounds raised by the learned Counsel for the defendant appellant and the matter has to be examined on the basis of the position as it was in existence with reference to the master plan on the date when the Ceiling Act came into force on 17th February 1976, the date on which the rights of the parties had become crystallised and therefore, at that time if the land in question could be utilised for residential purposes, the mere change in the development plans subsequently would not create any legal impediment against the use of the same for the same land purpose, which too is a public purpose and it would not amount to any contravention of law, if such land is permitted to be used for raising the construction of the dwelling units for the weaker sections of the society. In the facts and circumstances of this case, therefore, it cannot be said that, the MOA was no more capable of being enforced and that the concerned authorities could not sanction the scheme as such even if they wanted to sanction and the plaintiff respondent could claim to enforce the MOA.

35. Now the question arises as to whether it is a case for a specific performance of the contract. The normal rule is that when a promise is made, the same is expected to be maintained. In the words of Sir Frederick Pollock, "The Law of Contract represents the constant endeavour of public authority viz., the State, to establish a positive sanction for the expectation that it will be kept." In the words of Prof. Goodhart, "The moral basis of Contract is that the promisor has by his promise created a reasonable expectation that it will be kept." Therefore, as and when there is a promise between the two parties, the reasonable expectation is that such promise will be honoured unless there are compelling reasons.

36. Now that we have the Law relating to specific reliefs enacted through The Specific Relief Act, 1963, the matter is required to be examined with reference to the provisions of the Act. Section 10 of this Act provides for the cases in which specific performance of a contract is enforceable and Section 14 provides for the contracts not specifically enforceable.

The learned Counsel for the defendant appellant has submitted that the dwelling units constructed on this land have to be ultimately sold out to the flat owners of a Co-operative Society and in fact, the holder is also prohibited from transferring the land after the Act comes into force, the plaintiff respondent can have no right to purchase the land and in this regard, the learned Counsel has made reference to various provisions of the Ceiling Act, the rules made thereunder and the guidelines. In our opinion, what is sought to be enforced through specific performance is not a right to purchase the land. What is sought to be enforced is the right to execute the scheme for construction of the dwelling units on the land in question for the members of the weaker sections and to deal with such dwelling units later on, in accordance with law, subject to the relevant provisions of the Act, rules or the conditions which may be imposed by the competent authority while sanctioning the scheme. The learned Counsel for the defendant appellant has relied upon the case of NAHAR SINGH v. HARNAK SINGH AND ORS., reported in (1996) 6 SCC 699. In this case, the specific performance of the agreement of sale of an immovable property was considered and the Court held that property must be identifiable in order to avail the relief under the Act. The trial Court, without application of its mind to the identifiability of the property, granted the decree. The appellate Court, on examination of the

material on record, came to a positive conclusion that the agreement did not contain specifications about the exact area of the land to be sold, boundaries, length and breadth of the land, and also came to the conclusion that the agreement was entered into to save the Stamp duty and registration fee and was, therefore, opposed to public policy. The High Court dismissed the Second Appeal and the Supreme Court declined to interfere with the findings of the first appellate Court as confirmed by the High Court. This case which was decided with reference to specific performance of the agreement under Sections 20 and 22 of the Specific Relief Act, is of no avail to the defendant appellant in the present case because, on the reading of the three documents on the basis of which the arguments have been raised, we find that there is no uncertainty with regard to the identifiability of the land in question on which the scheme is to be executed and the land in respect of which the scheme is to be executed stands clearly defined with regard to its situation as well as area. The vacant land stands determined under law and the scheme is to be executed only with reference to the vacant land and nothing can be said to be there against the public policy in the facts of the case.

According to the law laid down in MAYAWANTI v. KAUSHALYA DEVI, reported in (1990) 3 SCC 1, the existence of a valid and binding contract between the parties is necessary for specific performance. We have already considered this aspect in detail in the earlier part of this order and we have already held on consideration of the three documents that there is no uncertainty or ambiguity and it was a case of valid and binding contract. In GOMATHINAYAGAM PILLAI AND ORS., v. PALANISWAMI NADAR, reported in AIR 1967 S.C. 868, the claim with regard to specific performance of agreement for sale of a land was considered and in para 6 of the judgment, it was held that it was for the party claiming the specific performance to establish that he was, since the date of the contract, continuously ready and willing to perform his part of the contract. In this regard, the observations made by the Judicial Committee of the Privy Council in the case of A. Ardeshir H. Mama v. Flora Sassoon reported in AIR 1928 PC 208 have been quoted. There cannot be any dispute with reference to the proposition of law, but we have already found in the facts of this case that the plaintiff respondent was throughout ready and willing to perform his part of the contract. In fact, he had partly discharged his obligations of preparing and submitting the scheme from time to time so as to see that the scheme which was the

subject matter of the agreement is sanctioned and for that purpose he had also made initial investments and had also shown his efforts to mobilise the necessary funds.

37. As a matter of fact, we have found that there is continuous readiness and willingness on the part of the plaintiff respondent and he cannot be said to have failed to discharge his obligations under the contract and therefore, the case of N.P.THIRUGNANAM (DEAD) BY LRS. v. DR.R.JAGAN MOHAN RAO AND ORS., reported in (1995) 5 SCC 115 is of no help to the defendant appellant in the facts of this case.

In M/S.P.R.DEB & ASSOCIATES v. SUNANDA ROY, reported in AIR 1996 S.C. 1504 decree for specific performance was refused, because the respondent purchaser had failed to make the payment within the stipulated time and it was on account of the failure on the part of the respondent to comply with the terms of the agreement. The Court held that the respondent was unwilling to perform his part of the contract. All that has been held by the Supreme Court is that the plaintiff in his suit for specific performance must be ready and willing to carry out his part of the agreement at all material times and in the end of para 7 of the judgment, the Supreme Court has observed that, in fact, even after the decree for the specific performance, the respondent had not been able to deposit the amount specified by the High Court within the time prescribed.

In the case of K.S. VIDYANANDAM AND ORS., v. VAIRAVAN, reported in (1997) 3 SCC 1, the Supreme Court has laid down the circumstances to be considered in exercising the discretionary powers of the Court for granting of decree for specific performance. In the case before the Supreme Court, the agreement had specified six months period within which the plaintiff was to purchase the Stamp duty papers, tender the balance amount of consideration and required the defendant to execute the sale deed, but there was a total inaction for two and half years after initial payment of a small amount as earnest money by the plaintiff and that is the circumstance which weighed against the exercise of discretion for grant of specific performance. We fail to understand as to how the law laid down in this case could be of any avail to the defendant appellant in the present case. The plaintiff respondent had submitted the schemes from time to time and the scheme dated 29th January 1979 was also submitted within time and if filing of more than one schemes had become necessary in view of the change of guidelines and if at all there was any mistake or error,

with regard to the area and description in the scheme which had been submitted earlier i.e. prior to 29th January 1979, the same were based on the details which had been furnished by the original defendant appellant himself and such errors of no consequences cannot be read against the readiness and willingness on the part of the plaintiff respondent and we do not find any such circumstance available against the plaintiff respondent in the facts of the present case.

In the case of LOURDU MARI DAVID AND ORS., v. LOUIS CHINNAYA AROGIASWAMY AND ORS., reported in AIR 1996 S.C. 2814, the Supreme Court has observed that, it is settled law that the party who seeks to avail of the equitable jurisdiction of a Court and specific performance being equitable relief, must come to the Court with clean hands. As a question of fact, the Supreme Court noted the circumstances pointed out in the judgment of the Division Bench of the High Court that there were three circumstances which disentitled the plaintiff to equitable relief as he had come with a positive case of incorrect and false facts. Such is not the fact situation in the case at hand and, therefore, this judgment also is of no help to the defendant appellant because, we find that there was no misconduct on the part of the plaintiff respondent in submitting more than one schemes and he had not concealed or suppressed anything or mis-represented anything which was otherwise untrue to his knowledge while claiming specific performance through the present suit.

In S.RANGARAJU NAIDU v. S. THIRUVARAKKARASU, reported in AIR 1995 S.C. 1679, the Court found that if the debtor was not in a position to pay, the Court was not bound to grant specific performance. The Court granted alternative relief sought for in the suit, namely, decree of refund of money due to money lender with simple interest. However, it noted the undertaking for payment of the amount within a period of six months and thereafter also ordered that in case the default is committed in making the payment of the decreetal amount, the decree for specific performance shall stand confirmed. We do not find as to how this authority can be of any avail to the defendant appellant.

38. On behalf of the plaintiff respondent, the reliance was placed on 1991 SUPP. (2) SCC 3 the case of SURESH JINDAL v. RIZSOLI CORRIERE DELLA SERA PRODZIONI T.V.S.P.A. AND ORS. The Supreme Court in this case was concerned with regard to the relief of injunction with reference to Section 38 of the Specific Relief Act, 1963.

In this case, an Indian film producer had filed a suit for specific performance of the contract against a foreign film Company and producer. The Indian film producer had several films to his credit and the respondents, three Italian Companies and a foreign film producer acting on behalf of these Companies, had entered into an agreement with the Indian film producer for production and exhibition of a television serial based on an Italian novel. The Italian Companies and the foreign film producer were unable to make any headway in their project and were not even able to obtain the permission of Govt. of India for shooting the film in India which was a pre-requisite for them to start their project. The Indian film producer claimed that the respondents Italian Companies had got in touch with him on 30th April 1989 and there were certain negotiations between the parties and the purport of an agreement was said to have been arrived at in the course of these negotiations and the same was set down in a letter dated 2nd May 1989 written by the foreign film producer to the Indian film producer. There was a concluded agreement between the parties in which the Indian film producer was to arrange to get Govt. of India's approval for the project and also to act as a co-producer and discharge all such functions that a co-producer may be required to do. By making certain modifications to the script, necessitated by the policies and guidelines of the Indian Govt. with which he was familiar, he was able to obtain the permission of the Govt. of India for the shooting of the film on 1st August 1989 and he also took concrete steps for the study of suitable locations for the shooting of the film and to discharge his responsibilities as a co-producer. The complaint was that, soon after the Govt. permission was obtained on 1st August 1989, the respondents began cold shouldering him, dissociated themselves and proceeded ahead with the production of the film without his participation. The Indian film producer, therefore, filed the suit for specific performance of the agreement dated 2nd May 1989 and also filed two applications for interim relief. The High Court took the view that, even if the Indian film producer had rendered some services as claimed by him, but refused to be acknowledged by the respondents, he could be adequately compensated by award of damages. Although it was possible that the Court may ultimately be able to assess some damages for this breach in case it comes to the conclusion that there had been such breach. No doubt, the matter was at the stage of interim relief when this case was decided, but the Supreme Court noticed that the appellant, i.e. Indian film producer had made it clear that he was not interested so much in the monetary aspect of the deal,

the gain by way of reputation as well as goodwill which he would have secured for his services upon acknowledgment in the title shows of the film is not the one which could be adequately assessed in terms of money. The Supreme Court also noticed the situation that by the time the suit is finally decided any such exhibition of acknowledgement may become totally impossible or infructuous and in that situation, there will be no alternative but to assess the damages somehow or the other depending upon the findings of the Court on the issues in the case. However, the Supreme Court found prima facie case having regard to the fact that the necessary modifications in the credit titles could be easily made as the film was still in the early stages of its exhibition and that it was just and necessary that the Indian film producer is granted the interim relief by injuncting the respondents from exhibiting the film except after displaying and acknowledgement of the appellant's services. Notwithstanding as to whether there was a concluded contract or not, the Supreme Court found that the Indian film producer did play some part in making the film possible and that the respondents were acting unreasonably in denying the benefit of the limited acknowledgement which he was entitled to have and in view of the respondents' disinclination even to extend this courtesy to the appellant, the Supreme Court was initially to issue directions to effect necessary changes in the title shots and introduce an acknowledgement of the services of the Indian film producer in an appropriate language before distributing the film and its copies. The grant of such direction was considered to be absolutely within the scope of the suit to mete out the proper justice, but having learnt that though the picture was shot in India, it was being exhibited in foreign countries and even if a direction as proposed was given, it might be difficult for the Court to ensure that the respondents carry out these directions and that even the Indian film producer would not be in a position to ensure that such directions are complied with, the Supreme Court instead of issuing such general directions, restricted the scope of interim relief and directed that in case the film is proposed to be or is exhibited either on T.V. or in any other medium in India, it shall not be so exhibited by the respondents or their agents unless it carries in its title shots, an acknowledgement of the services rendered by the appellant to the producers through some appropriate language. In issuing such directions even at interim stage, whatever services had been rendered by the Indian film producer in taking the steps for study of suitable locations for the shooting of the film and in obtaining the Govt.'s permission etc.,

weighed heavily while issuing the directions as aforesaid notwithstanding the fact whether there was a concluded contract or not. The facts of this case have one typical similarity with the facts of the present case inasmuch as the plaintiff respondent had also acted upon on the basis of the three documents in preparing and submitting the scheme and taking it up to the stage of approval by the specified authority through his efforts and in case the scheme goes through, he is likely to earn reputation and goodwill for being an active developer and organiser as a builder for the construction of dwelling units for the members of the weaker sections of the society.

In the case of VERRALL v. GREAT YARMOUTH BOROUGH COUNCIL, reported in (1981) 1 QUEENS BENCH 202, the Court of Appeal considered a case in which the defendant Council had agreed in April 1979 to a two day hiring of a hall by the National Front, a political party, for its annual conference in October. In May 1979, the Council, following a change in its political control, repudiated the contract of hire. An action was brought on behalf of the National Front for specific performance of the contract. On an application by the National Front, the summary judgment under R.S.C., Ord. 14, the Judge, on appeal from the master, ordered specific performance of the contract by the Council. On appeal by the Council, it was held dismissing the appeal, that a case could properly be dealt with on an application under R.S.C., Ord. 14 when, as in the present case, all the issues were clear and the point of substance could be decided as well on such an application as it could at a trial. That, where it was appropriate to do so, the court would protect any interest, whether an estate in land or a licence of a transient nature, by injunction or specific performance; that in a proper case the court would grant specific performance of a contractual licence even where it had been repudiated before the licensee had entered into possession; and that the Judge had rightly exercised his discretion by granting specific performance of the contract in the interest of freedom of speech.

39. On the question of impossibility to perform the contract, the learned Counsel for the defendant appellant submitted that, Section 56 of the Indian Contract Act and the English decisions are only persuasive and they cannot be applied to the contrary statutory provisions. The learned Counsel for the defendant appellant placed reliance on AIR 1954 S.C. 44 in the case of SATYABRATA GHOSE v. MUGNEERAM BANGUR AND CO., AND ANR. A reading of paras 22, 24 and 25 of this judgment shows that it was held by the Supreme Court that, having regard to the

nature and terms of the contract, the actual existence of war conditions at the time when it was entered into, the extent of the work involved in the development scheme and last though not the least the total absence of any definite period of time agreed to by the parties within which the work was to be completed, it cannot be said that the requisition order vitally affected the contract or made its performance impossible. The events which had happened could not be said to have made the performance of the contract impossible and the contract had not been frustrated either. After considering certain English decisions, in para 15 it has been observed as under:

"(15). These differences in the way of formulating legal theories really do not concern us so long as we have a statutory provision in the Indian Contract Act. In deciding cases in India, the only doctrine that we have to go by is that of supervening impossibility or illegality as laid down in Section 56 of the Contract Act, taking the word 'impossible' in its practical and not literal sense. It must be borne in mind, however, that section 56 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties."

In the case of STATE OF WEST BENGAL v. M/S.B.K.MONDAL AND SONS, reported in AIR 1962 S.C. 779, it was observed in para 12 that, while dealing with the problem of construing a specific statutory provision, it would be unreasonable to invoke the assistance of English decisions dealing with the statutory provisions contained in English Law. While referring to the case of Ramanandi Kuer v. Kalawati Kuer, reported in AIR 1928 P.C. 2, the Supreme Court quoted the very Privy Council decision as under:

"It has often been pointed out by this Board that where there is a positive enactment of the Indian Legislature the proper course is to examine the language of that statute and to ascertain its proper meaning uninfluenced by any consideration derived from the previous state of the law or of the English law upon which it may be founded."

In the case of LALA KAPURCHAND GODHA AND ORS., v. MIR NAWAB HIMAYATLIKHAN AZAMJAH, reported in AIR 1963 S.C. 250, it was observed in para 8 that there was some English authority to the effect that discharge of a contract by a third person is effectual only if

authorised or ratified by the debtor. In India, however, the words of S.41 of the Contract Act leave no room for doubt and when the appellants have accepted performance of the promise from a third person, they cannot afterwards enforce it against the promisor, namely, the respondent. Thereafter, in para 9, it has been observed that, when a statute clearly covers a case, it is hardly necessary to refer to decisions.

In the case of SANDHYA ORGANIC CHEMICALS P. LTD. AND ORS., v. UNITED PHOSPHOROUS LTD. AND ANR., reported in AIR 1997 GUJARAT 177, in para 16 of the judgment while dealing with the argument based on the cause of action on common law and equity, as against the express provision of Section 27 of the Contract Act, the Court considered as to how far the principles laid down by the English Courts on common law and equity are applicable. While following the view taken by the Supreme Court in the case of Superintendence Co. of India v. Krishnan Murgai, reported in AIR 1980 S.C. 1717, it was observed that it was not permissible to import principles of English Law de hors the statutory provision, unless the statute is such that it cannot be understood without the aid of the English Law. When the rule of English Law receives statutory recognition by the Indian Legislature, it is the language of the Act which determines the scope, uninfluenced by the manner in which the analogous provision comes to be construed narrowly, or otherwise modified, in order to bring the construction within the scope and limitations of the rule governing the English doctrine of restraint of the trade.

In Halsbury's Laws of England, 4th Edn., Vol. 9, with regard to the partially executed agreements, in para 270 on page 152, the principle has been formulated as under:

"270. Partially executed agreements. Where an "agreement" remains executory on one side, but has been wholly or partially executed on the other, the very fact of execution may itself tend to lead to the conclusion that the "agreement" is binding; or, where it is only partially executed on the one side, the court may alternatively deduce that there is a binding contract broadly on the terms of the "agreement", but merely in respect of the executed part; and where the "agreement" has been partly or wholly executed on both sides it would seem probable that the courts would give their assistance. Where a conclusion of one of the foregoing types cannot be reached,

a remedy can only be sought in quasi contract tort."

In Halsbury's Laws of England, 4th Edn., Vol.44, in para 401 on page 275-276, under the main heading of "The Remedy and Its Scope, and the sub-heading, "The Nature of Specific Performance", it has been mentioned as under:

"401. The remedy by specific performance. Specific performance is equitable relief, given by the court to enforce against a defendant the duty of doing what he agreed by contract to do; a plaintiff may, therefore, obtain judgment for specific performance even though there has not, in the strict sense, been any default by the defendant before the issue of the writ.

In early times a court of equity assumed jurisdiction to compel a party to a contract to perform his part of the contract when damages recoverable at law were not an adequate remedy. The remedy of specific performance is thus in contrast with the remedy by way of damages for breach of contract, which gives pecuniary compensation for failure to carry out the terms of the contract. The remedy is special and extraordinary in its character, and the court has a discretion either to grant it, or to leave the parties to their rights at law. However, the discretion is not an arbitrary or capricious discretion; it is to be exercised on fixed principles in accordance with the previous authorities. The judge must exercise his discretion in a judicial manner. If the contract is within the category of contracts of which specific performance will be granted, is valid in form, has been made between competent parties and is unobjectionable in its nature and circumstances, specific performance is in effect granted as a matter of course, even though the judge may think it is very favourable to one party and unfavourable to the other, unless the defendant can rely on one of the recognised equitable defences. Where such a defence is available, the existence of a valid contract is not in itself enough to bring about the

interference of the court. The conduct of the plaintiff, such as delay, acquiescence, breach on his part, or some other circumstance outside the contract, may render it inequitable to enforce it, or the contract itself may, for example on the ground of misdescription, be such that the court will refuse to enforce it."

In the same volume, i.e. Halsbury's Laws of England, in para 406, at page 281, it has been mentioned as under:

"406. Acts the performance of which would require continued supervision. It has been held that the court does not enforce the performance of contracts which involve continuous acts and require the watching and supervision of the court, and that, in particular, the court does not normally order the specific performance of a contract to build or repair. However, this rule is subject to important exceptions, and a decree for specific performance of a contract to build will be made if the following conditions are fulfilled: (1) that the building work is defined by the contract between the parties; (2) that the plaintiff has a substantial interest in the performance of the contract of such a nature that he cannot be adequately compensated in damages; (3) that the defendant is in possession of the land on which the work is contracted to be done.

It is no objection to granting specific performance of an agreement for a lease that the lease is to contain a covenant by the defendant to repair.

However, more recent cases indicate that the courts are now more ready to enforce contracts requiring supervision. The question is whether the contract sufficiently defines the work to be done, expressly or by implication, to permit the court to make an order which enables the defendant to know what he has to do to comply with it. The court now has a statutory power to order specific performance of a landlord's covenant to repair a dwelling house.

The court has power to direct that if an order for the specific performance of a contract is not complied with, the act required to be done may so far as practicable be done by the party by

whom the order or judgment was obtained or some other person appointed by the court, at the cost of the disobedient party."

40. The learned Counsel for the plaintiff respondent placed strong reliance on BAI DOSABAI v. MATHURDAS GOVINDDAS AND ORS., reported in AIR 1980 S.C. 1334. In the facts of this case, the appellant Bai Dosabai had obtained 2 plots of land from her father-in-law by way of gift. She executed a deed on 25th February 1946 styled as "Deed of Lease" in favour of Indu Prasad Dev Shankar Bhatt, whose successors in interest were the respondents in the appeal before the Supreme Court. Clause 17 of the Deed was considered as an important clause. On consideration of the terms of the Deed, and the relevant statutory provisions, the Supreme Court found that the obligation of the lessor to sell the land by public auction and pay the excess price to the lessee was an obligation annexed to the ownership of the property, not amounting to interest in the property, that it is an obligation in the nature of a trust and, therefore, the obligation which may be specifically enforced. The argument was raised that the contract had become impossible for performance as a result of the enactments of the Ceiling Act. The Act had come into force subsequent to the passing of the decree by the High Court and the question for consideration before the Supreme Court was as to what is the effect of the Ceiling Act on the decree passed by the High Court. In para 14 of the judgment, the Supreme Court observed that, while it is true that events and changes in law occurring during the pendency of the appeal which required to be taken into consideration in order to do complete justice between the parties and so that a futile decree may not be passed, it is also right and necessary that decree should be so moulded as to accord with the changed statutory situation. The right obtained by the party under a decree cannot be allowed to be defeated by delay in the disposal of the appeal against the decree, if it is possible to save the decree by moulding it to conform to the statutes subsequently coming into force. The Supreme Court found that this proposition emerges from the decisions of the Court in the cases of Pasupuleti Venkateswarlu V. The Motor & General Traders, reported in AIR 1975 S.C. 1409 and Rameshwar v. Jot Ram AIR 1976 S.C. 49. The question, therefore was, how the decree passed by the High Court could be saved and given effect. The Supreme Court considered the provisions of Section 21 of the Ceiling Act which provide that where a person holds any vacant land in excess of the ceiling limit and such person declares within the prescribed time and in

the prescribed manner before the competent authority that the land is to be utilised for the construction of dwelling units for the accommodation of the weaker sections of the society in accordance with any scheme approved by the specified authority, then the competent authority may, after due enquiry, declare such land not to be excess land and permit such person to continue to hold the land for the said purpose subject to the prescribed terms and conditions.

41. The learned Counsel for the defendant appellant sought to distinguish Dosabai's case (supra) on the ground that in the case of Dosabai, the decree had been passed even before the commencement of the Ceiling Act, but we find that even this distinction has been fully dealt with in the case of SHAH JITENDRA NANALAL v. PATEL LALLUBHAI ISHVERBHAI AND ORS., reported in AIR 1984 GUJARAT 145, decided by a Full Bench of this Court. In this case, the Court while adverting to the aforesaid decision in Dosabai's case (supra) in para 12 of the judgment, has observed as under:

> "The learned Counsel appearing for the respondents in this case pointed out that the said decision would have no application here because in that case the decree challenged in appeal before the Supreme Court had been in existence even prior to the commencement of Act No.33 of 1976. No doubt, this is referred to in the judgment but this is not of material significance, for, it is not as if, for that reason, the Supreme Court took the view that the appellate decree which was subjected to appeal before the Supreme Court should be confirmed. The Court found that subsequent event, viz. the new enactment had to be noticed and relief moulded to accord therewith. The relevant and significant point to be noticed is that the Court took the view that in view of the provision for exemptions under Ss.20 and 21 of the Act having been invoked in that case and exemption was sought to be worked out through a Receiver appointed by the Court, that arrangement should survive and in case the exemptions became effective, the benefit of the proceeds should be applied to discharge the dues of the decree-holder. We see in this decision an approach to the question which accords with what we have said in this judgment. The fact that provisions of Ss.20 and 21 of the Act contemplate exemption and, therefore, the relief that is to

be granted should be moulded in accordance with the provision for exemption have been noticed and applied in that case."

42. Thus, the point of distinction raised on behalf of the defendant appellant stands answered by the Full Bench decision of this Court as aforesaid and it cannot be said that in such cases specific performance cannot be granted. The Full Bench has also considered that in appropriate cases the decree for the specific performance may be made conditional on the exemption obtained and it has been categorically held that a conditional decree for specific performance subject to exemption being obtained under Section 20 of the Ceiling Act is permissible. The only difference is that in the case at hand, the question of exemption is under Section 21 of the Ceiling Act instead of Section 20. The possibility of obtaining exemption survives till the notification is issued under Section 10 of the Act and, therefore, before the issuance of the notification under Section 10 of the Act, a plaintiff seeking specific performance cannot be told that the terms of the contract cannot be fulfilled and there is no bar against the decree being passed for specific performance and it may also be made conditional subject to the grant of exemption.

43. The learned Counsel for the defendant appellant then raised the contention that it is not a case for specific performance and also submitted that the contract is not specifically enforceable because this contract runs into such minute and numerous details that the Court cannot enforce specific performance of its material terms and that the performance involves the performance of a continuous duty which the Court cannot supervise. In this regard, we find that in case the scheme is sanctioned and executed in accordance with law, it would not involve such minute and numerous details that the Court cannot enforce the specific performance of its material terms. Such terms are clearly set out in the suit documents as aforesaid, the authorities under the Act are there to take care of the requirements of law and the provisions as are contained in the relevant law have to be followed in case the performance is to be made after the sanction under Section 21 and in our considered opinion, the material terms do not show that they cannot be enforced through specific performance. Reference has already been made in the earlier part of this order to such terms and we also find that there is no question of a continuous duty in this case which cannot be supervised and it goes without saying that the authorities under the Ceiling Act are there to see and supervise the execution

of the scheme and a bare reading of Section 14 of the Specific Relief Act makes it clear that the contract in the present case is not a contract against the specific performance of which there is any legal impediment. It is no doubt true that for grant of equitable relief to enforce the duty for which the parties had agreed, the Court has ample power, authority and jurisdiction to compel a party to a contract to perform the contract when damages is not adequate relief or remedy. The remedy of specific performance cross-matches the remedy of damages for breach of a contract when grant of damages is not found to be adequate and yet the Court has discretion to grant or not to grant, but the only requirement is that this discretion has to be exercised on established norms and settled principles. In cases of this nature where the questions relate to the reputation or goodwill, job satisfaction or of exhibiting a distinguished professional skill and consequential status, the payment in terms of money cannot afford an adequate relief and the orientation and modern approach in such cases as has been applied by the various Courts and the Apex Court is to grant specific performance under the statute, that is, the Specific Relief Act.

Chitty on "Contracts", (27th Edn.) Vol.1 has mentioned as under, with regard to the constant supervision, at page 1294 in para 27-016:

"The court can, for example, appoint a receiver to perform the acts specified in the order, or appoint an expert to act as officer of the court for the purpose, or it can authorise the plaintiff to appoint a person to act as agent of the defendant for the purpose of performing those acts. Where the acts to be done under the contract are not to be done by the defendant personally, the court can order him simply to enter into a contract to procure those acts to be done. ..... It is submitted that difficulty of supervision should not of itself be regarded as a bar to specific performance but only as one of many factors to be taken into account in determining whether this form of relief is to be granted. If the court attaches sufficient importance to the interest which the plaintiff wishes to protect, it will not be deterred from granting specific relief by the argument that such relief will require constant supervision."

44. Thus, on consideration of the settled principles

of law relating to specific performance and on consideration of various cases as discussed above, we find that the law is too well settled on interpretation of the relevant statutory provisions that the cases in which the reputation, goodwill and the question of job satisfaction etc. are involved, the compensation in money cannot be an adequate relief and when it is found that the specific performance of the material terms do not include such minute and numerous details so as to show that the Court cannot enforce the specific performance and the specific performance is possible without involving the supervision and continuous duty of the Court, in appropriate cases the Court has the discretion to order the specific performance. The contract for which the specific performance is sought in the present case is not covered by any of the ingredients under Section 14 of the Specific Relief Act, it is a case for specific performance subject to appropriate conditions with which we will be dealing with hereinafter. It is rather a case in which the specific performance is enforcible under Section 10 of the Specific Relief Act.

45. The plaintiff respondent is, therefore, entitled to the specific performance and the other allied consequential reliefs, but conditionally.

46. The next and the third question is as to whether the specific performance has to be ordered subject to any conditions. In this case, the question of condition has assumed greater importance. It is a case of the execution of a statutory scheme. No doubt, the MOA in its Clauses 6 and 7 takes care even with a contingency of amendment, modification or repealing of the Ceiling Act in future, but so long as the Ceiling Act is in force, the specific performance of this contract is possible only when the final sanction of scheme is made available and declaration is issued under Section 21 of the Ceiling Act. We have already recorded after due discussion that after the approval by the specified authority, the required sanction under Section 21 of the Act has not been granted and the question of granting sanction to the scheme and the question of issuing declaration under Section 21 of the Ceiling Act is still pending with the concerned authorities and it is for the concerned authorities to take the decision in this regard in accordance with law. In case the sanction is granted to the scheme and declaration is issued under Section 21 of the Act, then and then alone, the specific performance of this contract is possible.

47. The declaration by the competent authority under Section 21 of the Act in accordance with law, in our opinion, is the sine qua non and quid pro quo so as to make the specific performance of this contract possible and whereas we do not find ourselves to be in agreement with the view taken by the trial Court in para 119 of the judgment that, "the Government and ULC authority have virtually approved it" and we also do not agree with the stand taken by the defendant respondents nos.2, 3 and 4 that only a formal order of competent authority finally approving the scheme under Section 21(1) of the ULC Act was to be passed and whereas we find that the competent authority has yet to consider the question of issuing the declaration under Section 21 of the Ceiling Act and the issue of such declaration is a condition precedent or pre-requisite under Section 21 with regard to the land in question and even in case of such declaration, the terms and conditions as may be imposed by the concerned authority including the condition as to the time limit etc. have to be adhered to and the relief of specific performance will, therefore, be subject to the condition of the issue of declaration under Section 21 as also the condition which may be imposed by the concerned authority while issuing such declaration, if at all such declaration is decided to be issued. In view of the discussion and our conclusions as aforesaid on second and third questions formulated in para 11, issues nos.12, 16, 17, 18, 22, 23 and 24 are covered and stand answered accordingly.

48. Thus, the three main questions formulated by us in para 11 stand answered accordingly.

49. Before we proceed to deal with the points which were raised on behalf of the defendant appellant as set out in para 6 of this judgment including the consideration of Civil Application No.3721 of 1996. we may deal with issue no.13. The learned Counsel for the defendant appellant had argued that the plaintiff has included even those expenses in the amount of Rs.16,75,000/- which he had not incurred with regard to the scheme in question and that the plaintiff had actually failed to prove that he had incurred the said amount. On this aspect of the matter the trial Court has held that the plaintiff had spent substantial amount for preparing the scheme and getting it sanctioned and therefore, that issue has been decided accordingly. We find in the facts of this case that this issue is in fact not an issue of serious consequence because, the evidence led by the parties do indicate that certain amount has been incurred by the plaintiff respondent for the purpose

of preparation and submission of the scheme/schemes and even if it is found that he has not spent the exact amount of Rs.16,75,000/and it is somewhat less than that, that is not going to impinge upon the main controversy involved in this case nor there is any question of refund of this amount and therefore, it is not necessary to go into the details as to what is the exact figure which was spent by the plaintiff for the purpose claimed by him. The trial Court has also not held that the plaintiff has in fact spent Rs.16,75,000/and has only held that he has spent a substantial amount. In this view of the matter, even if it is shown that the plaintiff respondent had included certain other expenses or that he could not explain certain items as to whether they were related to the scheme/schemes in question or not, it is not going to affect the decision as such one way or the other and there is no prayer for the refund of this amount and in this view of the matter, we do not find it necessary in the facts of this case to go further so as to determine the actual amount and whereas it is clear that certain amount which cannot be said to be insignificant has been spent, the interference with the findings of the trial Court on the basis of certain trifles of no consequence is found to be unwarranted.

50. Coming to the objections raised by defendantappellant as set out in para 6 of this judgment and Civil Application No.3726 of 1996, the learned Counsel for the defendant appellant submitted with reference to issue no.19 that the original defendant had expired on 1.9.1988 and thereafter despite the amendment including the legal heir and representative of the original defendant as defendant no.1/1, no prayer has been made and no relief has been claimed against defendant no.1/1 and all the reliefs are directed against the original defendant no.1, original defendant no.1 was a dead person on the date of the decree and, therefore, the suit was liable to be dismissed. Contrary to this it was submitted on behalf of the plaintiff respondent that defendant no.1/1 was joined as legal representative of the original defendant and she represents the estate of deceased original defendant; the right to sue or right to relief survives against the legal heir and representative of the original defendant and the decree is binding against her in the same manner as it would have been against the original defendant. There is no dispute that defendant no.1/1 was joined as legal representative of the deceased original defendant and she represents his estate. We have already held in the earlier part of this order that the MOU could not be rescinded and even the death of the original defendant has no impact so as to

terminate the agency in this type of cases and therefore, the agency continued devolving all obligations of the original defendant upon his legal heir and representative. Since the relief is in respect of the execution of a scheme on a part of the estate which has devolved upon the defendant no.1/1 as a result of the death of the original defendant during the pendency of the suit and there is no dispute that she represents this estate and the agency does not stand terminated and the MOA could not have been rescinded, we do not find that the absence of the specific prayer against the defendant no.1/1 is fatal so as to render the suit to be liable to be dismissed on that ground and the decree cannot be said to be a decree passed against the dead person or that it is a nullity. For the same reasons it also cannot be held that the suit itself had abated on the death of the original defendant on 1.9.1988.

51. The learned Counsel for the defendant appellant then submitted that joinder of defendants nos.2, 3 and 4, i.e. specified authority, competent authority and the State of Gujarat was not permissible and the trial Court wrongly allowed the application at Exh.71 dated 21.7.1981 while passing the order dated 2.11.1982. It may be pointed out that against this order dated 2.11.1982, a revision was preferred before this Court by the defendant appellant and the revision application was rejected on merits by this Court on 30th March 1984. This decision has been reported in 26 (1) GLR 14, i.e. Civil Revision Application No.2010 of 1982 (FATEHSINHRAO PRATAPSINHRAO GAEKWAD v. SAVJIBHAI HARIBHAI PATEL). The Court has considered the submissions made by the parties in detail on merits and this decision has attained finality and the Court has held that, under Order 1 Rule 10(2) the trial Court has the power to strike out or add parties; proper party need not be necessary party but is one whose presence is considered by the Court for effectually adjudicating the suit. While deciding the revision application, the Court had also considered and negatived the contention that considerable prejudice will be caused if these parties are allowed to be added, because added parties will have the same right as original party including filing the pleadings etc. It was observed by the Court that this would not cause failure of justice or irreparable injury and by merely joining them as party, no failure of justice will occasion, on the contrary, if they had not been joined as party, it was likely that the failure of justice might have resulted and that by the impugned order failure of justice is prevented. The Court has found on merits that the impugned order joining these defendants is legal and proper order and that

whereas the matter had been argued at length on all questions, the question with regard to the proviso under Section 115(1) of the Code of Civil Procedure was also decided. Faced with this situation, the learned Counsel for the defendant appellant argued that even if the revision application has been dismissed, the question was still open to be raised in this appeal and in support of his submission, he has placed reliance on the cases of (i) SATHYADHYAN GHOSAL AND ORS., v. SMT. DEORAJIN DEBI AND ANR., (AIR 1960 S.C. 941); (ii) AMAR CHAND BUTAIL v. UNION OF INDIA AND ORS., (AIR 1964 S.C. 1658; AND (iii) THE UNITED PROVINCES ELECTRIC SUPPLY CO. LTD. v. T.N. CHATTERJEE AND ORS., (AIR 1972 S.C. 1201). In Sathyadhyan Ghosal (supra), the Supreme Court was concerned with an order of remand as an interlocutory order which did not terminate the proceedings and therefore, it was found that the correctness thereof could be challenged in an apeal from the final order and accordingly, the appellant was not precluded from raising the question. In the facts of the present case, the High Court while deciding the revision application had not remanded the matter in respect of the trial Court's order dated 2.11.1982, but had decided the controversy on merits. The cases in which the appeal is filed against the order passed in remanded proceedings cannot be compared with this type of cases in which the questions decided by the High Court in a revision application on merits are sought to be agitated again in regular appeal after the passing of the decree and therefore, we do not find that this decision is of any help to the defendant appellant on this question so as to argue that the questions decided in revision application on merits are still open to be raised in this appeal.

In the case of Amarchand Butail (supra), the Supreme Court was concerned with the claim of privilege of document which had been upheld by the trial Court and affirmed on appeal by Judicial Commissioner by an interlocutory order. When the appeal by Special Leave to Supreme Court against the final decree in the suit was filed, the plea that the Courts below were at an error in upholding the claim of privilege was found to be open to the appellant and not barred by res-judicata. In para 9 of the judgment, the Supreme Court has observed that at the stage of trial a document purporting to be an affidavit was filed making claim for privilege and it was found that on the point of the privilege, the appellant could not be met by the plea of res-judicata before the Supreme Court, because whatever may have been the position in regard to the effect of the interlocutory order passed by the Judicial Commissioner on this point,

now that the matter had come to the Supreme Court in the form of appeal by the appellant against the final decree passed in the suit, it was perfectly open to him to say that the Courts below were in error in upholding the plea of privilege. Whether the claim of privilege was justified or not was an interlocutory order but the order dated 30th March 1984 which has been passed by this Court while deciding the revision application against the trial Court's order dated 2.11.1982 cannot be said to be an interlocutory order and, therefore, this decision too is of no avail to the defendant appellant.

The next case of The United Provinces Electric Supply Co. Ltd. (supra) is based on AIR 1960 S.C. 941 in the case of Sathyadhyan Ghosal (supra) and the Supreme Court has held that the principle of res-judicata is not applicable to interlocutory orders as a party is not bound to appeal against every interlocutory order which is a step in the procedure that leads to a final decision or award; where the High Court in writ proceedings quashed the proceedings of interlocutory nature and remanded the matter to the Tribunal under Article 227 of the Constitution for fresh disposal in accordance with law, the order is interlocutory and not a final order, and therefore, the decision on any particular point given therein cannot operate as res-judicata in an appeal by Special Leave filed against the final award of the Tribunal given after the remand. We have considered all the three judgments as aforesaid and we find ourselves unable to agree with the contention raised on behalf of the defendant appellant that the questions which have been decided on merits by the High Court itself in revision application are still open to be raised in this first appeal. The order passed by the High Court in revision on merits against the order dated 2.11.1982 whereby defendants nos.2, 3 and 4 were arrayed as parties, by no stretch of imagination, can be said to be an interlocutory order or an order passed remanding the matter or an order in remanded proceedings and therefore, the questions which have been decided by the High Court while deciding the revision application between the same parties in the same subject matter cannot be said to be open to be raised again in appeal before the High Court. The learned Counsel for the defendant appellant yet argued that the Court has no jurisdiction to add a person as party who is neither necessary nor proper, that the defendants nos.2, 3 and 4 had no legal or direct interest in any of the suit documents, that they could only be witnesses to place proper record before the Court, that in a suit for specific performance of agreement only parties to agreement are necessary and proper parties;

arguments were also raised with reference to order 27-A Rule 1 and 1-A of the Code of Civil Procedure and on these questions, large number of authorities were cited. Whereas we have already held that the questions which have been decided in the revision application by the High Court with regard to the impleading of the defendants nos.2, 3 and 4, i.e. the authorities under the Ceiling Act and State of Gujarat are not open to be raised now in the appeal, we do not find it necessary to overburden this judgment with the consideration of the cases which were cited in this regard and we find that these objections stand fully answered in the decision rendered by this Court between the parties in the revision application on 30th March 1984 when these parties are joined as defendants whether any relief is claimed or not, the findings on issues concerning the Ceiling Act will bind these added parties and they will be actively and independently before the Court and assist the Court in arriving at its findings; they are proper parties who can throw light on these issues and therefore nothing turns out in favour of the defendant appellant on the question of joinder of defendants nos.2, 3 and 4 and there is no question of putting their names off the record.

52. The learned Counsel for the defendant appellant then raised the question with regard to the verification of the written statement which had been filed on behalf of the defendants nos.2, 3 and 4 bearing the date of 19th December 1985 signed by Shri R.A.Desai, District Govt. Pleader, Baroda, available in Vol.3 of the paper book as Exh.134 at page 278 (877). This is a written statement on behalf of the specified authority, competent authority and State of Gujarat. At page 283 (882) the verification reads as under:

"Verification

I, R.A. Desai, Dist. Govt. Pleader, Baroda subscribe and state that what is stated above is true & correct to the best of the information received from the Dept. concerned.

Baroda dtd.19-12-85. Sd/-
(R.A. Desai)
Dist.Govt.Pleader-Baroda

Sd/-
(G.D.Chauhan)
5-4-90
C.A. & Addl. Collector

U.L.C. Baroda.

Sd/-
5-4-90
N. Vallabhram
S.A. and Superintending
Engineer
(R & B) Circle
Vadodara"

Page 282 (881) shows that this page which is signed at the end by Shri R.A.Desai, District Govt. Pleader bears the signature of the specified authority and competent authority respectively on 5.4.1990, in the margin. On both these pages, i.e. 282 and 283 of the written statement on behalf of defendants nos.2 to 4, Shri R.A. Desai has signed as District Govt. Pleader, Baroda, while Shri N.Vallabhram and Shri G.D. Chauhan have signed as specified authority and competent authority under the Ceiling Act; however, the date below the signatures of specified authority and competent authority on both the pages is 5.4.1990, while the written statement bears the date of 19th December 1985 on both the pages. The objection raised on behalf of the defendant appellant is that, at the time when the written statement was filed, it was not duly verified by all the three defendants. An application dated 17th July 1989 at Exh.202, page 63 (1739) of Vol.59 of the paper book, was moved on behalf of the defendant no.1/1 under Section 151 read with Order 6 Rules 14 and 15 of the Code of Civil Procedure, seeking a direction to defendants nos.2, 3 and 4 to duly sign and verify the written statement. This application was granted on 16.10.1989 and defendants nos.2, 3 and 4 were directed to duly sign and verify the written statement in view of the provisions of Order 6 Rules 14 and 15 of the Code of Civil Procedure, within seven days, i.e. on or before 24.10.1989. The defendants nos.2, 3 and 4, instead of complying with the Court's order dated 16.10.1989 as aforesaid, moved an application dated 26th March 1990, Exh.245 at page 84-86 of Vol.59 of the paper book, seeking the review of the order dated 16.10.1989, passed below Exh.202 contending that Order 6 Rules 14 and 16 of the Code of Civil Procedure would not be applicable in case of the written statement on behalf of the Government and its officers and while relying upon the provisions of Order 27 of the Code of Civil Procedure as well as Rule 121 of the Law Officers' Rules, it was submitted that when the suit is filed against the Government and if the Government undertakes the defence of the suit against an officer in

his official capacity, the approved written statement shall be subscribed and verified by the Government Pleader and, therefore, the order dated 16.10.1989 may be reviewed and set aside and that order may be passed that the signature and verification by the District Govt. Pleader on written statement at Exh.34 is proper and the District Govt. Pleader is authorised to sign and verify the pleadings. On 4.4.1990, the Court passed an order that this review application does not survive and the same was filed. In the meanwhile, on 23rd March 1990, an application at Exh.237, page 78 of Vol.59 of the paper book, was filed by defendant no.1/1 praying that the defence of the defendants nos.2, 3 and 4 be struck off because they had not complied with the Court's order passed below Exhs. 202 and 203. On this application at Exh.237, an order was passed on 4th April 1990, at page 79 of Vol.59, with reference to Order 27 Rule 8 of the Code of Civil Procedure that maximum time limit was required to be granted in favour of the Government and, therefore, in the interest of justice, fresh notice was required to be issued to defendants nos.2, 3 and 4 and defendant no.1/1 was directed to furnish correct addresses of the defendants and fresh notices were to be issued thereafter and that it would be pre-mature to pass an order below application at Exh.237 to strike out the defence. When the parties had already been served earlier, and the written statement on behalf of the defendants nos.2, 3 and 4 bears the signature and date, i.e. 19th December 1985, no necessity could be conceived of to issue fresh notice to these defendants and we find that this order dated 4th April 1990 at page 79 of Vol.59 of the paper book is rather incomprehensible; but the fact remains that the defendants nos.2 and 3 appended their signatures on the written statement as well as below the verification on 5.4.1990. Against this order dated 4.4.1990, Civil Revision Application No. 382 of 1990 was preferred by the defendant no.1/1 on 10.4.1990 before the High Court and the High Court decided this revision application with the consent order dated 20th February 1991 observing that the defendant no.1/1 will be at liberty to raise this question after disposal of the suit. In this regard, on behalf of the defendant appellant, it has been argued that the defendants nos.2, 3 and 4 had not verified the written statement as required by Order 6 Rule 14 and order 27 Rule 1 of the Code of Civil Procedure and therefore, the written statement must be taken off the record, that the District Govt. Pleader's application at Exh.245 for review was misconceived and yet the trial Court, by its order dated 4.4.1990 directed for supply of the fresh addresses and to issue fresh notices and that it shows the type of

likelihood which the Court was willing to give to the plaintiff and the defendants nos.2, 3 and 4. The Court's attention was invited to Exh.112, i.e. memo of appearance which had been filed by Shri R.A.Desai, on behalf of the defendants nos.2, 3 and 4 dated 29th September 1984 and Exh.244, memo of appearance of D.G.P. Shri Bhavsar, dated 26th March 1990 and, therefore, there is no question of issuing fresh notice to the defendants nos.2, 3 and 4. We do find that, at this stage, there was necessity for issuing fresh notices to the defendants nos.2, 3 and 4 who had already been served and the order dated 4th April 1990 in view of the facts set out hereinabove is beyond comprehension. But, the substance of the matter is that the written statement dated 19th December 1985 did bear the signatures of the District Govt. Pleader at the end of the written statement as also below the verification and obviously, he had signed for the defendants nos.2, 3 and 4; besides this, ultimately, the defendants nos.2 and 3 had also appended their signatures on the written statement as well as the verification on 5.4.1990 and all these facts put together show that the written statement has been verified. The further objection is that in the language of the verification, the names of the defendants nos.2, and 3 are not there and the name of only Shri R.A.Desai, District Govt. Pleader is there and that he can be said to represent only the State of Gujarat. In our considered opinion, this objection is not an objection of any serious consequence and on this ground the verification cannot be said to be defective so as to entail the striking out of the defence. Such objection with regard to verification does not go to the root of the matter so as to entail ignoring of the written statement or to strike the defence and, therefore, even if it is found that the order dated 4.4.1990 was inappropriate and improper, it does not have the impact of vitiating the proceedings, because it is essentially a matter of procedure and once the pleadings and verification are signed, there is no question of any fatal consequence. In cases where the written statements are filed jointly on behalf of more than one defendants even if it is verified by one of the parties, yet it is not fatal. In the present case, the defendant no.4 is the State of Gujarat and defendants nos.2 and 3 are its functionaries under the Act and the joint written statement has been filed. In the facts and circumstances of this case, we find that this object is not of any consequence and on such ground, neither the defence could be struck off nor the decree can be reversed. Even if the pleadings are not verified, the Court has to grant the opportunity to the party to cure such defect, such

defect is curable and in the facts of this case, ultimately, the defendants nos.2, 3 and 4 have signed and verified the pleadings and accordingly this objection is rejected.

53. This brings us to the next objection in the matter of discovery, production and inspection of documents. On 17th July 1989, the application was moved by defendant no.1/1 that the defendants nos.2, 3 and 4 be directed to make discovery on oath all originals and copies of the documents which are, or have been in possession of defendants nos.2, 3 and 4 relating to matters in question in the suit and be further directed to make such discovery on oath by way of an affidavit or documents in Form No.5 in Appendix-C of the Code of Civil Procedure, at pages 65-66 of Vol.59 of the paper book, i.e. Exh.283. On 11.9.1989, the trial Court directed the defendants nos.2 to 4 to file an affidavit declaring the documents. On 23rd March 1990, an application was moved for striking out the defence of defendants nos.2, 3 and 4 on the ground that the written statement was not verified and the affidavit of documents have not been made as directed by the trial Court on 11th September 1989. This application dated 23rd March 1990, at Exh.237 is at page 78 of Vol.59 of the paper book. On 27th March 1990, the defendant no.2 filed affidavit of documents as Exh.265 and the District Govt. Pleader filed a list of 14 documents marked as Exh.266 on behalf of defendants nos.2 and 3. On the same date, i.e. 27th March 1990, the affidavit of documents was also filed on behalf of the defendant no.3, i.e. Exh.264 at page 106-107 of Vol. 59 of the paper book. On 29th March 1990, vide Exh.268, page 112 of Vol.59 of the paper book, the defendant appellant filed the purshis in the trial Court stating that the inspection of the documents disclosed by the defendants nos.2 to 4 shall be taken up without prejudice to their application including the application for striking out the defence. On 15th April 1990, the defendant appellant moved an application vide Exh.287, pages 141-142, of Vol.59 of the paper book for issuing the direction against the defendants nos.2 to 4 to comply with the order of the trial Court for making of affidavit of documents as set out therein. On 25th April 1990, a purshis was moved by the defendant appellant before the trial Court for recording the statement made by the District Govt. Pleader before the trial Court on 24th April 1990 to the effect that the defendants nos.2, 3 and 4 were willing to produce the entire original record relating to the matter in question in the suit except, 'another departmental correspondence' and later on, it was also agreed by the District Govt. Pleader to

produce all the files and record including another departmental correspondence. This purshis dated 25th April 1990 is at Exh.332 at page 174 of Vol.59 of the paper book. The District Govt. Pleader did produce all the files and record including departmental correspondence. Vide Exh.335 at page 137 of Vol.59 of the paper book, the defendant no.2 produced 8 files pertaining to the schemes, letter dated 15th November 1979 sent by defendant no.2 to 3, letter dated 7.2.1980 addressed by defendant no.2 to defendant no.3 and the confidential letter dated 2.2.1980 addressed by defendant no.4 to defendant no.2. On 30th April 1990, a common order was passed by the trial Court below various applications at page 142 of Vol.59 recording that the District Govt. Pleader had agreed to produce all the files and documents relating to the suit including the departmental correspondence and the defendant no.1/1 will be at liberty to get xerox copies thereof and to take inspection of all these documents as and when they are produced in the Court. On the same day, i.e. 30th April 1990, an order was passed below Exh.299 by the trial Court at page 98 of Vol.59 of the paper book that there was no wilful default on the part of the defendants nos.2 to 4. We find that the orders were passed on 5th July 1990, 6th July 1990, 11th July 1990, and 25th July 1990, i.e. Exhs. 406, 414, 415, the order below Exh.348 permitting inspection and the taking out xerox copies of the documents. We may make a pointed reference to the order dated 18th April 1990 passed below Exhs.274 and 201 at pages 121 to 128 of Vol.59 and it was recorded in para 8 of this order that the defendant had already taken inspection of the documents disclosed. We may also refer to the order dated 21st March 1990 passed below Exh.197 whereby the trial Court had allowed the application of the plaintiff for production of documents and directed the defendants nos.2 and 3 to produce the documents as prayed for in paras 12-A and B of the application at Exh.197 and further that if the defendants fail to carry out the order, the plaintiff shall be at liberty to produce a copy thereof and get it exhibited. Against this order dated 23.3.1990, Civil Revision Application No.374 of 1990 was preferred before the High Court and the High Court disposed of this revision application on 6.4.1990 by recording the statement of the plaintiff's Counsel and modifying the last part of the order dated 23.3.1990 below Exh.197 by directing the deletion of last part of the order, i.e., "and get it exhibited" and it was clarified that the plaintiff will be at liberty to produce the copy subject to the provisions of the Evidence Act and prove the same in accordance with law. On this very date, i.e. 21.3.1990, an order was also

passed below Exh.232 allowing the production of 7 ledgers and 7 cash books and 37 vouchers which had been produced by the plaintiff. On 26th March 1990, the trial Court had partly allowed the application vide order passed below Exh.239, that is, application made by the defendant appellant herein for reframing of the issues by directing amendment in some of the issues and by raising three additional issues. Against this order dated 26th March 1990, Civil Revision Application No.368 of 1990 was preferred before the High Court and on 3rd April 1990, this revision application was decided by the High Court on merits and the application of the defendant appellant was partly allowed in respect of Issue no.22 by directing the amendment of the said issue, but the application was rejected in other aspects. On 18th April 1990, the order was passed below Exhs.286 and 285 by the trial Court allowing the defendant appellant to amend the written statement. Civil Revision Application No.524 of 1990 was decided by consent order keeping the contention open for being taken after the disposal of the suit. On 30th April 1990, by passing an order below Exh.300, the trial Court had rejected the application of the defendant appellant for review of the order dated 21st March 1990 passed on applications at Exh.232 and 234, page 1112. Against this order also a revision application was preferred before the High Court, being Civil Revision Application No.632 of 1990 and the High Court decided the same on 20th April 1991 by passing a consent order keeping the contentions taken in the Civil Revision Application as open for being taken after the disposal of the suit if so required. On 4.12.1990, an order was passed below Exh.738, that is, application which had been moved by the defendant appellant praying that the two letters dated 9th March 1978 addressed by defendant no.4 to defendants nos.2 and 3 produced from the Government files be automatically marked as Exhibits. By its order dated 4.12.1990, the trial Court rejected this application by observing in para 35 that the said letters could not be straightway admitted and exhibited under Sections 32, 35 or 74 of the Evidence Act. In this matter also, revision application was preferred being Civil Revision Application No. 237 of 1991 before the High Court and the same was rejected by the High Court on 26th March 1991. The matter was taken to the Supreme Court. The Supreme Court while dismissing the Special Leave Petition No.11709 of 1991 ordered that the observations made by the High Court must be taken as confined to for the disposal of the revisions and were not conclusive of the rights of the parties. The defendant appellant had moved an application at Exh.1117 for exhibiting 58 documents produced from the files of

the defendants nos.2 to 4 straightway save and except the 8 documents referred to therein in respect of which the plaintiff had no objection. This application was dismissed by the trial Court by passing an order on 2.4.1991 below Exh.1117. This order dated 2.4.1991 is at pages 327-385 of Vol.59 of the paper book. On 25th June 1991, below this very application at Exh.1117, a further order was passed on 25th June 1991 as an order supplementary to the order dated 2nd April 1991. In fact against the order dated 2nd April 1991 passed below Exh.1117, Special Civil Application No.3749 of 1991 had been filed and while deciding this Special Civil Application, the High Court observed that there was no reason to interfere with the order passed by the trial Court and the High Court further observed that the judgment and order of the trial Court about admissibility /non-admissibility of the documents was always subject to order that may be passed in appeal. The matter was taken to the Supreme Court through Special Leave Petition No.15825 of 1991 and the Supreme Court vide order dated 25.10.1991 allowed the defendant appellant to withdraw this Special Leave Petition with observation that the observation made by High Court in the impugned judgment will not affect the rights of the parties in the appeal Court. On 13th February 1991, by passing an order below Exh.1124, the trial Court had rejected the defendant appellant's prayer for stay of the hearing of the application at Exh.1117 till Exh.1124 was decided. Against this order dated 13th February 1991, Civil Revision Application No.206 of 1991 had been preferred before the High Court. The High Court decided the revision application on 28th February 1991 by directing the trial Court to decide application at Exh.1117 without any reference to the applicability of Section 32 of the Evidence Act and thereafter to decide Exh.1124 on merits as set out in the order. Exh.1124 was thus decided by passing an order below it on 11th April 1991 by the trial Court and thus the application for directing the defendants nos.2, 3 and 4 to furnish information in the proforma Para 5 of the said application was rejected. Against this order dated 11th April 1991, no Civil Revision Application was filed and the order became final. The defendant appellant had moved one more application at Exh.1129 seeking a direction against the defendants nos.2 to 4 to lead their evidence in the first place, immediately after the plaintiff closes his evidence and that they be directed to step in the witness box before the defendant no.1/1 starts his evidence and in case the defendants nos.2 to 4 decline to lead evidence, they may be examined as Court witnesses and the defendant no.1/1 be given an opportunity to cross-examine

them. This application at Exh.1129 was rejected by the trial Court on 22nd April 1991. Against this order dated 22nd April 1991, Civil Revision Application No.501 of 1991 was preferred, but the High Court rejected the same on 12th June 1991 by saying that the trial Court had considered all aspects of the matter and no case was made out for interference with the order passed by the trial Court. The matter was taken then to the Supreme Court against the High Court's order dated 12th June 1991 and on 25th October 1991, the Supreme Court allowed the defendant to withdraw the Special Leave Petition against the High Court's order dated 12th June 1991, by observing that the observations made by the High Court in the impugned judgment will not affect the rights of the parties in the trial Court. The defendant appellant had also moved an application at Exh.1290 with the prayer that the defendants nos.2 to 4 and the person holding the post of Competent authority and specified authority and the Secretary/Under Secretary and the Revenue Department of the Govt. of Gujarat during the period October 1977 to 1991 be called as Court witnesses. This application was also rejected by the trial Court on 19th September 1991. The defendant appellant's review application for the review of the order dated 19th September 1991 by moving an application at Exh.1303 was also rejected on 11th October 1991.

54. We have referred to the aforesaid various orders passed by the trial Court, the High Court, and the Supreme Court not only by way of narration of the litigation, which has taken place between the parties on the questions relating to the production, discovery and inspection of the documents, for the purpose of seeking certain directions against the defendants nos.2, 3 and 4, for calling them as Court witnesses etc. but to keep in view all these orders passed by High Court and Supreme Court because the questions which were sought to be raised against the orders passed by the trial Court were not decided conclusively and the observations have been made that such orders would not affect the rights of the parties. All these questions directly or indirectly relate to the question of the production, discovery and inspection of the documents and the grievances which have been raised with regard to certain documents which were sought to be exhibited straightway etc. We have considered all these aspects in detail and we find that so far as the discovery, production and inspection of the documents is concerned, whatever documents were available and were in possession of the plaintiff and defendants nos.2, 3 and 4 had been duly produced and the Court had also permitted both the sides to take the xerox copies of

all the documents as also inspection thereof and therefore, the grievance which was raised through various applications in this regard did not survive in view of the orders passed permitting the parties to take xerox copies and it cannot be said in the facts of this case, that the defendants had not produced the documents which were in their possession except for the two documents, that is, order dated 3.3.1980 and the Minutes of the Sub-Committee of the Cabinet. The order dated 3.3.1980 was an order in the nature of the stay of the further proceedings under the Ceiling Act after the specified authority had passed the order on 15th November 1979 and the other document, i.e. Minutes dated 17.9.1981 of the Sub-Committee of the Cabinet, by which it was proposed to set aside the proceedings. We have already come to the conclusion that no decision either way has been taken by the concerned authorities on the question of the declaration and, therefore, even if these two documents would have been produced and allowed to be exhibited, it would only show that the final decision under Section 21 of the Act had not been taken. We have not been able to understand as to why any reference to these documents was not made in the written statement which was filed on behalf of the defendants nos.2 to 4, but for the reasons best known to the defendants nos.2 to 4, if they have not made any reference to these documents in their written statement, it cannot be said that it gives rise to such grievance to the defendant appellant for vitiating the trial and this also cannot be said that it has caused any prejudice to the defendant appellant particularly in view of our finding that even as on today there is no final decision under Section 21 of the Act and these documents could have only shown that a final decision had not been taken. Thus, in our opinion, the grievance with regard to these documents is only illusory.

55. Civil Revision Application No. 382 of 1990 was a revision application directed against the application at Exh.237 and the consent order while rejecting the revision application was that the defendant appellant had liberty to agitate the points raised in the revision application. This application was for striking out the defence of defendants nos.2, 3 and 4 and we have already considered this aspect of the matter and have found that there was no case for striking out the defence on the grounds on which the same was sought by the defendant appellant.

56. In Civil Revision Application No. 524 of 1990 while rejecting the revision application on 30th April 1990, against the orders which have been passed below

application at Exh.201, consent order was passed for affidavit of the documents. In fact, the plaintiff had already produced all the documents on which he relied upon and had also stated on oath that he had no other documents in his power and possession and, therefore, the trial Court had rightly rejected the application and the grievance actually did not survive.

57. The subject matter of the Revision Application No. 632 of 1990 was with regard to the review of the order dated 21.3.1990 below applications at Exhs.232 and 233. The review application was rejected by an order dated 30th April 1990 passed below application at Exh.300. The order dated 21st March 1990 was with regard to the list of the documents with which we have already dealt with and the reading of the order below application at Exh.300 at pages 164-168 of Vol.59 of the paper book shows that no ground had been made out for the review and the application had been rightly rejected.

58. In Civil Revision Application No.237 of 1991, the grievance was that two letters dated 9.3.1978 which had been sent by defendant no.4 to defendants nos.2 and 3 be automatically exhibited, the High Court had rejected the revision application on 26th March 1991 and the Supreme Court, on 1.8.1991 observed that it will not be conclusive of the rights of the parties. This grievance has to be considered along with certain other documents about which the same grievance has been raised. The applications at Exhs.1117, 1124 etc. were made and the orders passed by the trial Court on these applications were made the subject matter of Revision Application No. 206 of 1991 and with regard to the admissibility and non-admissibility of the documents, Special Civil Application No.3749 of 1991 was filed which was decided by the High Court on 24th September 1991, against which, the Special Leave Petition was filed before the Supreme Court and the same was decided on 25/10/1991 and while allowing the defendant appellant to withdraw the Special Leave Petition, it was observed that the impugned judgment of the High Court would not affect the rights of the parties.

In this regard, it may be pointed out that for the purpose of documents to be automatically exhibited, ultimately the grievances survived with regard to 36 documents only. These 36 documents which were sought to be exhibited automatically show that they are the letters sent by one authority to another authority, i.e. the competent authority; Collector; Municipal Commissioner; Deputy Town Planner; Gujarat Slum Clearance Board; Town

Planning Department; Secretary, Revenue Department; Executive Engineer; Supdt. Engineer; Deputy Town Planner; Town Planning and Valuation Department; letter dated 3.3.1980 from the Deputy Secretary to the Competent authority; notes of Government; Panchayat and Housing and Urban Development Department; Minutes of the meeting of the Sub-Committee of the Cabinet of the Govt. of Gujarat, dated 17th September 1981 and the two letters dated 9th March 1978 sent to the Competent authority by the Deputy Secretary, Govt. of Gujarat, Revenue Department. On the question of automatically exhibiting these documents, large number of authorities were cited for and against by the parties with reference to the provisions of Indian Evidence Act. However, we find that these documents relate to the opinion or the stand of the various Departments and authorities with regard to the schemes and whereas we have already held that it is not for this Court to go into the objections against the validity, legality, propriety and correctness of the scheme/schemes, we do not find it necessary to go into these aspects of the matter because, even if these documents would have been exhibited, they could not have tilted the balance of the case either way on merits and, therefore, it is not necessary to overburden this judgment with the large number of authorities cited on the question of admissibility of the documents and the automatic exhibition of these documents in evidence and the two documents dated 3.3.1980 and the Minutes of the Sub-Committee of the Cabinet dated 17th September 1981 have already been discussed in the earlier part of this order and all that can be said is that the final decision under Section 21 of the Ceiling Act has not been taken. These 36 documents also include a letter dated 16th December 1977 sent by one Indirabai to the Competent authority and a letter dated 14th March 1978 sent by the Collector to Indirabai, statement of Indirabai before the Competent authority on 22nd March 1978. These documents are with regard to the title dispute as she claims that 25 acres had been given to her. This is a dispute between Indirabai and the original defendant which has nothing to do with the present controversy and, therefore, they could hardly be of any relevance for the purpose of the controversy raised in the suit. One of the documents is a certified copy of a plan showing the open space which question has already been considered in the earlier part of the order and one of the documents is a letter dated 2.1.1980 purporting to have been sent by the plaintiff respondent to the Asst.Collector about which it has been alleged by the learned Counsel for the plaintiff respondent that it is unsigned. Be that as it may, we are of the considered opinion that these

documents, even if taken on record, could not have had any material bearing on the main controversy and whereas we have not found it necessary, in the facts of this case, to go into the objections against the scheme the consideration of which is still pending for final declaration under Section 21 of the Act, the grievances raised in this regard are of no legal consequence.

59. The subject matter of the grievance in Civil Revision Application No. 501 of 1991 was with regard to the application which had been moved by the defendant appellant calling upon the defendants nos.2 to 4 to lead evidence and that they may be examined as Court witnesses. This revision application was rejected as no case was found, on 12th June 1991 and on 25.10.1991, the Supreme Court while allowing the withdrawal of the Special Leave Petition observed that the impugned judgment will not affect the rights of the parties. It was for the defendants nos.2 to 4 whether they wanted to lead any evidence or not. The defendants nos.2 to 4 were concerned only with regard to the scheme and, therefore, firstly, it was for them to decide whether they wanted to lead any evidence or not and if they considered that it was not necessary for them to lead evidence, they could not be called upon to lead evidence. It was also not necessary to summon them as Court witnesses. Several authorities were cited on these points also, but there is no dispute that in appropriate cases, the Court has ample power to summon any person or officer as Court witness, and in the facts of the present case, we find that if the defendants nos.2 to 4 were not called upon or not summoned as Court witnesses, the orders this effect cannot be said to be unlawful and the same have not resulted into any prejudice to the defendant appellant.

60. The learned Counsel for the defendant appellant had also submitted that the defendants nos.2 to 4 had filed reply in collusion with the plaintiff, but we find that there is no basis for this grievance. The defendants nos.2 to 4 were only supposed to make clear their stand before the Court and on the basis of the pleadings in the written statement, we do not find that they have acted in collusion. Merely because no reference was made to the two documents, one dated 3.3.1980 and the other with regard to the Minutes of the Sub-Committee of the Cabinet, it cannot be said that they were in collusion with the plaintiff. While making the written statement, the Law Department may not have found it necessary to refer to them as no final decision had been taken at Government level and no communication on the basis of the Minutes of the Sub-Committee had been

issued. We fail to understand the plea of collusion also because even before this Court, the respondents nos.2, 3 and 4 have not shown any interest in the matter, nothing has been argued except the say of learned Asstt. Govt. Pleader, Mr.Pujari, on 22.4.1998 that the respondents nos.2 to 4 stand by their reply filed before the trial Court. They have left the parties to fight their respective cases.

61. The learned Counsel for the defendant appellant had also referred to certain questions which had been put on behalf of the defendant - appellant during the course of the trial to witnesses which were disallowed and has also raised a grievance that the evidence which should have been taken on record was rejected and the evidence which should not have been taken on record was allowed to be taken on record. In our considered opinion, no material question which could have had any serious impact has been disallowed and it cannot be said that any such evidence has been rejected or any such inadmissible evidence has taken on record which could be said to be sufficient to vitiate the trial. Apart from it, all these objections at the most relate to the remand of the matter and as has been observed earlier, the learned Counsel for the defendant appellant had pressed the Civil Application No.3721 of 1996 for remanding the matter. So far as the Court's power to remand in appropriate case is concerned, the same is well established and the Court has the power to order remand in appropriate cases. In this regard, series of authorities were cited, but we do not find it necessary to go into the same. Even if it is taken to be a case of improper admission or rejection of evidence, it is provided under Section 167 of the Indian Evidence Act that the improper admission or rejection of evidence shall not be a ground for new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised, that independently of the evidence objected to and admitted, there was no sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not have varied the decision. In the facts of the present case, we find that independently of the evidence objected to and admitted, there is sufficient evidence to justify the decision and also that even if the rejected evidence has been received, it ought not to have varied the decision. The main controversy in this case was as to whether the MOU could be rescinded or not, whether the POA could be revoked and as to whether the ACD had ceased to be operative and as to whether the plaintiff respondent was entitled to an order for specific performance. On these aspects of the matter, we find

ample evidence on record and we have already dealt with these aspects and we do not find that the improper admission or rejection of the evidence which has been complained of before this Court could have varied the decision on these main questions. Most of the objections are with regard to the matters relating to the validity of the scheme/schemes or the readiness and willingness on the part of the plaintiff respondent to go ahead with his obligations and on these questions, we may reiterate that the objections against the scheme/schemes do not warrant any adjudication by this Court and we have clearly said that pending consideration of the scheme for the purpose of final declaration under Section 21 of the Ceiling Act, there is no question of going into these objections and, therefore, in view of the evidence already on record, the decision could not have varied. In this view of the matter and keeping in view of the provisions of Section 167 of the Evidence Act, we do not find any justification for ordering the new trial or the reversal of the decision.

62. We may also refer to Section 99 of the Code of Civil Procedure which provides that no decree shall be reversed or substantially varied nor shall, in any case, remanded in appeal on account of any mis-joinder or non-joinder of parties or cause of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court. Having dealt with all the aspects as above, we have no hesitation to express in no uncertain terms that no such error, defect or irregularity in the proceedings has crept in in the present trial affecting the merits of the case or the jurisdiction of the Court. All the points as above on which the remand is sought and which have been raised in Civil Application No.3721 of 1996 hardly relate to the merits of the case as have been fully adjudicated. There has been no failure of justice and no prejudice has been caused to the parties for the purpose of putting up their respective case on merits and none of the objections raised on behalf of the defendant appellant could have affected the merits of the main controversy or could have varied the decision. The matters cannot be remanded or new trial cannot be ordered for trifles or for errors or irregularities of no consequence relating to the merits of the case. Keeping in view the provisions of Section 167 of the Evidence Act and Section 99 of the Code of Civil Procedure, we do not find any case for remand or grant of any of the reliefs claimed in Civil Application No.3721 of 1996 which deserves to be rejected and the same is hereby rejected and the Rule issued therein is hereby discharged.

63. It is not a case of a simple contract between two private parties limited to their individual interest in a transaction. In such matters when parties come forward before statutory authorities with a contract relating to welfare schemes, the execution of such schemes cannot be left to the sweet will of the parties. In this type of cases the paramount interest is to serve a public purpose for which cherished provisions have been made in the relevant statute. The parties may fight, contest and litigate to serve their own interest but should they seek to frustrate the scheme without any lawful justification merely because it does not suit them at a later point of time or because of their own likes or dislikes, the Court is not supposed to come to their aid. Agreements relating to such schemes and their execution cannot be allowed to be frustrated on grounds and grievances of fancies, when we find that such schemes are not personal but public and are meant for public purposes. In this case initially both the sides came before the authorities with hand in hand representing the scheme aimed at a pious purpose. More than one departments of the Government were involved in considering the scheme and from the beginning of 1977 till the beginning of 1980, the scheme/schemes were pursued, the defendant-appellant did not even raise a little finger against any of the suit documents or the scheme/schemes and after the expiry of the time limit within which such schemes could be submitted and after the approval of the scheme by the specified authority in November 1979 and thereafter when the stage came for the consideration under Section 21 of the Ceiling Act, the defendant-appellant suddenly took an about turn in February 1980. Since then till now, i.e. for last 18 years the litigation is going on and the ultimate sufferer has been the class of members of weaker sections of the society, we are simply bemoaned to notice such a situation in the facts of the present case.

64. The upshot of the aforesaid discussion and adjudication is that, we do not find it to be a case either for remand or for the reversal of the decree, but only to modify the decree in terms that the plaintiff respondent shall be entitled to enforce the specific performance as granted by the trial Court, subject to the condition of the final declaration under Section 21 of the Urban Land (Ceiling and Regulation) Act, 1976 being issued with regard to the land in question by the respondents nos.2 to 4 in accordance with law. The appeal is partly allowed to the extent as above only. In all other aspects, the decree granted by the trial Court is confirmed. Whereas a scheme meant for the

construction of the dwelling units for the members of the weaker sections of the Society is awaiting since long, we also deem it proper to direct the respondents nos.2 to 4 to take a final decision either way with regard to the issue of the declaration under Section 21 of the Ceiling Act in accordance with law at the earliest possible opportunity, but in no case, later than 15th August 1998. The decree shall be operative only if the declaration is issued under Section 21 of the Ceiling Act. We also order that the defendant-appellant shall also maintain the position as obtaining today with regard to the land in question till the decision is taken by the concerned authorities under Section 21 of the Ceiling Act in accordance with law and thereafter all legal consequences shall follow. It is further ordered that even if the respondents nos.2 to 4 take a final decision under Section 21 of the Ceiling Act and finally sanction the scheme and issue declaration under Section 21 of the Ceiling Act on 15th August 1998 or on any date earlier to 15th August 1998, it will not be open for the plaintiff respondent to enforce the decree for a period of one month from such date. All ad-interim or interim orders passed in these proceedings stand automatically vacated. Decree shall be modified accordingly, costs shall follow.

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